

6450-01-P

DEPARTMENT OF ENERGY

10 CFR Parts 850 and 851

Docket No. EH-RM-03-WSH

RIN 1901-AA99

Chronic Beryllium Disease Prevention Programs; Worker Safety and Health

AGENCY: Department of Energy.

ACTION: Proposed rulemaking and opportunity for public comment.

SUMMARY: Pursuant to section 3173 of the Bob Stump National Defense Authorization Act for Fiscal Year 2003 (NDAA), DOE is proposing regulations for worker safety and health at Department of Energy (DOE) workplaces. These proposed regulations are intended to maintain the high level of protection currently afforded workers throughout the DOE complex.

DATES: The comment period for this proposed rule will end on **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. The public hearings for this rulemaking will be held on: January 21, 2004 in Arlington, VA (Washington, DC) from 9:00 a.m. to 12:00 p.m. and from 1:30 p.m. to 5:00 p.m.; and February 4, 2004 in Golden CO (Denver) from 9:00 a.m. to 1:00 p.m., and from 4:00 p.m. to 8:00 p.m. Requests to speak at any of the hearings should be phoned in to Jacqueline D. Rogers, 301-903-5684, by January 20, 2004, for the Arlington, VA (Washington, DC) hearing; and February 2, 2004, for the Golden, CO (Denver) hearing. Each presentation is limited to 10 minutes.

ADDRESSES: Written comments (three copies) on the proposed rule should be addressed to: Jacqueline D. Rogers, U.S. Department of Energy, Docket Number EH-RM-03-WSH; EH-52/270 Corporate Square Building; 1000 Independence Avenue SW, Washington DC 20585-0270. Alternatively, comments can be

filed electronically by e-mail to: rule851.comments@hq.doe.gov noting “Worker Safety and Health Rule Comments” in the subject line. Where possible, commenters should identify the specific section to which they are responding.

Copies of the public hearing transcripts, written comments received, and any other docket material may be reviewed on the website specially established for this proceeding. The Internet website is <http://www.eh.doe.gov/whs/rulemaking>.

The public hearings for this rulemaking will be held at the following addresses:

Arlington, VA (Washington, DC): Marriott Crystal City Hotel, 1999 Jefferson Davis Highway, Arlington, VA 22202.

Golden, CO (Denver): DOE National Renewable Energy Laboratory, Visitor Center, Auditorium, 15013 Denver West Parkway, Golden, CO 80401 (I-70, Exit 263, right at top of exit ramp if coming from Denver, left at stop sign, building on right).

For more information concerning public participation in this rulemaking proceeding, see section IV of this notice of proposed rulemaking (Public Comment Procedures).

FOR FURTHER INFORMATION CONTACT: Jacqueline D. Rogers, U.S. Department of Energy, 1000 Independence Avenue SW, Washington DC 20585-0270, 301-903-5684, e-mail: jackie.rogers@hq.doe.gov.

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I. Introduction

DOE has broad authority to regulate worker safety and health with respect to its nuclear and nonnuclear functions pursuant to the Atomic Energy Act of 1954 (AEA), 42 U.S.C. 2011 *et seq.*, the Energy Reorganization Act of 1974 (ERA), 42 U.S.C. 5801-5911, and the Department of Energy Organization Act (DOEOA), 42 U.S.C. 7101-7352. Specifically, the AEA authorized and directed the Atomic Energy Commission (AEC) to protect health and promote safety during the performance of activities under the AEA. See Sec. 31a.(5) of AEA, 42 U.S.C. 2051(a)(5); Sec. 161b. of AEA, 42 U.S.C. 2201(b); Sec. 161i.(3) of AEA, 42 U.S.C. 2201(i)(3); and Sec. 161p. of AEA, 42 U.S.C. 2201(p). The ERA abolished the AEC and replaced it with the Nuclear Regulatory Commission (NRC), which became responsible for the licensing of commercial nuclear activities, and the Energy Research and Development Administration (ERDA), which became responsible for the other functions of the AEC under the AEA, as well as several nonnuclear functions. The ERA authorized ERDA to use the regulatory authority under the AEA to carry out its nuclear and nonnuclear function, including those functions that might become vested in ERDA in the future. See Sec. 105(a) of ERA, 42 U.S.C. 5815(a); and Sec. 107 of ERA, 42 U.S.C. 5817. The DOEOA transferred the functions and authorities of ERDA to DOE. See Sec. 301(a) of DOEOA, 42 U.S.C. 7151(a); Sec. 641 of DOEOA, 42 U.S.C. 7251; Sec. 644 of DOEOA, 42 U.S.C. 7254.

DOE (like its predecessors, the AEC and the ERDA) has implemented this authority in a comprehensive manner by incorporating appropriate provisions on worker safety and health into the contracts

under which work is performed at DOE workplaces. During the past decade, DOE has taken steps to ensure that contractual provisions on worker safety and health are tailored to reflect particular workplace environments. In particular, the *Integration of Environment, Health and Safety into Work Planning and Execution* clause set forth in the DOE procurement regulations requires DOE contractors to establish an integrated safety management system. 48 CFR 952.223-71 and 970.5223-1. As part of this process, a contractor must define the work to be performed, analyze the potential hazards associated with the work, and identify a set of standards and controls that are sufficient to ensure safety and health if implemented properly. The identified standards and controls are incorporated as contractual requirements through the *Laws, Regulations and DOE Directives* clause set forth in the DOE procurement regulations. 48 CFR 970.0470-2 and 970.5204-2. Following the enactment of the Price-Anderson Amendments Act of 1988, Pub. L. No. 100-408, granting the Department the authority to impose civil penalties for nuclear safety violations on contractors with Price-Anderson indemnification agreements, DOE supplemented its contractual based regulatory approach with a further more specific set of rules set forth in 10 CFR parts 820, 830, and 835 to ensure nuclear safety and protection from radiological hazards during the conduct of DOE activities.

In 2002, Congress directed DOE to promulgate regulations on worker safety and health governing contractors with Price-Anderson indemnification agreements rather than rely exclusively on a contractual approach to establish safe and healthy workplaces. Specifically, section 3173 of the NDAA amended the AEA to add section 234C (codified as 42 U.S.C. 2282c) that requires DOE to promulgate worker safety and health regulations that maintain “the level of protection currently provided to ... workers.” Pub. L. No. 107-314 (December 2, 2002). These regulations are to include “flexibility ... to tailor implementation ... to reflect activities and hazards associated with a particular work environment.” Section 234C also makes a DOE contractor with such an indemnification agreement that violates these regulations subject to civil penalties similar to the authority Congress granted to DOE in 1988 with respect to civil penalties. Section

234C also directed DOE to insert in such contracts a clause providing for reducing contractor fees and other payments in the event of a violation by a contractor or contractor employee of any regulation promulgated under section 234C while specifying that both sanctions may not be used for the same violation. The Secretary of Energy has approved the issuance of this Notice to propose regulations to implement the statutory mandate of the NDAA.

II. Proposed Regulations.

A. Summary.

The proposed regulation would set forth the obligations of DOE contractors (which, consistent with section 234C, proposed § 851.3 would define as entities under contract with DOE, including affiliated entities, subcontractors and suppliers) to provide safe and healthy workplaces for workers (which, consistent with section 234C, proposed § 851.3 would define as employees who perform work in a workplace covered by the proposed regulations). In particular, the proposed regulations would require a contractor responsible for a DOE workplace to ensure: (1) that the workplace is free from recognized hazards that are causing or are likely to cause death or serious bodily harm; and (2) that work is performed in accordance with the worker safety and health program for the workplace. Consistent with section 234C, the worker safety and health program must be approved by DOE and must achieve a level of protection at least substantially equivalent to the level of protection that existed in workplaces throughout the DOE complex in the year 2002 (i.e., the year of enactment of section 3173 of the NDAA) that are comparable to the workplaces to which the program would apply. When the regulations become effective, no work could be performed at a workplace for which DOE had not approved a worker safety and health program. Consistent with section 234C, DOE approval would be based on a determination that the program would achieve the required level of protection.

A contractor would develop and maintain a single worker safety and health program for all the

workplaces at a DOE site for which the contractor is responsible and would coordinate with any other DOE contractors responsible for other workplaces at the site to ensure an integrated and consistent approach to worker safety and health at the site. A contractor would discharge its duties concerning the worker safety and health program in a manner consistent with the integrated safety management process set forth in the clauses, *Integration of Environment, Health and Safety into Work Planning and Execution*. 48 CFR 952.223-71, 970.5223-1. First, the contractor would identify and analyze the workplace environment, the work activities performed there, and the potential hazards to workers. On the basis of this identification and analysis, the contractor would select and document a set of workplace safety and health standards that are necessary and sufficient to protect workers from the identified hazards in a manner that achieves a level of protection substantially equivalent to the level of protection that existed in comparable DOE workplaces in 2002.

A contractor should select the combination of appropriate standards that it believes is best designed to achieve the required level of protection in a manner consistent with the Departmental mission it is performing. DOE has included an appendix to the proposed regulations that sets forth a description of worker safety standards and programs generally acceptable for inclusion in a worker safety and health program. This appendix is based on DOE Order 440.1A, which sets forth DOE expectations concerning worker protection and which has been incorporated into most DOE contracts through inclusion of the order's Contractor Requirements Document. This appendix is included only to provide generally acceptable worker safety and health standards and programs and is not intended to prescribe particular standards and programs. The contractor would implement the worker safety and health program for a particular workplace in a manner tailored to fit the particular work environment of that workplace. Radiological hazards would not be covered by the proposed rule to the extent they are regulated by the existing requirements on nuclear safety and radiological protection set forth in 10 CFR parts 820, 830, and 835.

DOE intends to work with its contractors to achieve compliance with the regulations and maintain the high level of protection currently afforded workers. Once the proposed regulations are finalized, if a contractor violated them, DOE could take appropriate enforcement action against the contractor, including, in the case of contractors with indemnification agreements, the imposition of civil penalties or the reduction of contract fees.

With respect to a covered workplace operated by DOE, the proposed regulations would make DOE responsible for ensuring work is performed consistent with the requirements of the proposed regulations, including the establishment, maintenance and implementation of a worker safety and health program.

B. Level of Protection.

Section 234C mandates the promulgation by DOE of worker safety and health regulations that provide a level of protection substantially equivalent to that provided to DOE contractor workers when the NDAA was enacted. By focusing on level of protection, section 234C envisions regulations that emphasize results (that is, maintaining or improving the level of protection afforded DOE contractor workers), rather than prescribing detailed courses of action that may not be the most effective or sensible way of addressing a given hazard in a particular situation.

The proposed regulations would incorporate the statutorily mandated level of protection as follows. First, proposed § 851.100 would establish the general rule that a DOE contractor responsible for a workplace must ensure: (1) the workplace is free from recognized hazards that are causing or are likely to cause death or serious bodily harm; and (2) work is performed in accordance with the worker safety and health program for the workplace. This general rule codifies DOE's current expectations concerning the level of protection DOE contractors must afford workers, as set forth in DOE Order 440.1A. Second, proposed § 851.101(c)(2) would require a worker safety and health program to include a set of workplace safety and health standards that would achieve a level of protection at least

substantially equivalent to the level of protection that existed in the DOE complex in workplaces comparable to the workplaces to which the program would apply. Third, proposed § 851.102 would prohibit the performance of work at a workplace one year after publication of the final rule unless DOE had approved the worker safety and health program for the workplace on the basis of a determination that the worker safety and health program would achieve a level of protection at least substantially equivalent to the level of protection that existed in comparable workplaces in 2002.

C. Flexibility.

Section 234C mandates DOE to promulgate worker safety and health regulations that include sufficient “flexibility -- (A) to tailor implementation of such regulations to reflect activities and hazards associated with the particular work environment; (B) to take into account special circumstances at a facility that is, or is expected to be, permanently closed and that is expected to be demolished, or title to which is expected to be transferred to another entity for reuse; and, (C) to achieve national security missions of the Department of Energy in an efficient and timely manner.” This provision acknowledges the diversity and uniqueness of the DOE complex and the need to tailor worker safety and health programs to fit particular workplaces.

As a general matter, the proposed regulations would achieve the mandated flexibility by building on the practices and procedures already being undertaken by contractors as part of integrated safety management systems. Specifically, proposed § 851.101(c) would incorporate the essential features of integrated safety management, including: (1) defining the work; (2) analyzing the hazards; (3) identifying a set of standards necessary and sufficient to control the hazards; (4) implementing the set of standards properly in a manner tailored to reflect the workplace environment; and (5) providing for continuous feedback and improvement. Adherence to this approach should result in the selection of a set of standards tailored to fit the expected work and hazards and the implementation of those standards in a manner tailored to reflect actual

workplace conditions.

The proposed regulations also would include specific provisions to address the statutory requirements on flexibility. Proposed § 851.101(a)(2) would require the tailoring of a worker safety and health program to reflect the activities and hazards in a particular workplace. Proposed § 851.101(c)(4) would require a worker safety and health program to provide for tailored implementation of selected standards. Proposed § 851.101(e) would require a worker safety and health program to contain special provisions for transitional workplaces (which would be defined in proposed § 851.3 as facilities that are, or are expected to be, permanently closed and that are expected to be demolished, or title to which are expected to be transferred to another entity for reuse) and national security workplaces (which would be defined as workplaces where DOE undertakes national security missions). Examples of transitional workplaces could include: those sites that are undergoing decontamination, deactivation, dismantlement, or decommissioning; environmental restoration sites; or inactive sites where no ongoing operations are being performed beyond surveillance and maintenance activities.

D. Consistency with integrated safety management

Proposed § 851.101(a) would require contractors to develop worker safety and health programs. These programs should be established in a manner that is consistent with the *Integration of Environment, Health and Safety into Work Planning and Execution* clause set forth in the DOE procurement regulations. 48 CFR 952.223-71, 970.5223-1. As discussed in the preceding sections, the proposed regulations build on existing contract practices and processes to achieve safe and healthy workplaces and incorporate the essential features of integrated safety management. DOE has drafted the proposed regulations to be complementary to integrated safety management. Accordingly, DOE expects contractors to comply with the proposed regulations in a manner that takes advantage of work already done as part of integrated safety management and to minimize duplicative or otherwise unnecessary work.

As a general matter, DOE expects that, if contractors at a DOE site have fulfilled their contractual responsibilities for integrated safety management properly, little, if any, additional work would be necessary to establish the worker safety and health program required by the proposed regulations. Contractors should undertake new analysis and develop new documents only to the extent existing analysis and documents are not sufficient for purposes of the proposed regulations. In determining the allowability of costs incurred by contractors to develop approved worker safety and health programs, the Department will consider whether the amount and nature of a contractor's expenditures are necessary and reasonable in light of the fact that the contractor has an approved integrated safety management system in place.

E. Worker safety and health program.

1. Program.

To ensure achievement of the required level of protection, proposed § 851.100(b) would require the contractor responsible for a workplace to perform work in accordance with an approved worker safety and health program for the workplace. Proposed § 851.101(b)(1) would require the worker safety and health program to provide for eliminating, limiting or mitigating identified workplace hazards in a manner that is necessary and sufficient to provide adequate protection of workers.

Proposed §§ 851.101(a) and (d)(1) would require a contractor to prepare and maintain a single worker safety and health program that would apply to all the workplaces at a DOE site for which the contractor was responsible. At a site where there were multiple contractors responsible for various workplaces at the site, proposed § 851.101(d)(2)(B) would require the contractors responsible for covered workplaces at the site to coordinate with each other to ensure that the worker safety and health programs at the site were integrated and consistent.

2. Identification and analysis of work and hazards.

As part of the process of developing a worker safety and health program, proposed § 851.101(c)(1)

would require a contractor to identify and analyze: (1) the work to be performed; (2) the work environment including designs and features of facilities, equipment, operations and procedures important to a safe and healthful workplace; (3) existing and potential workplace hazards; and (4) the risk of worker injury or illness associated with the identified workplace hazards. Proposed § 851.3 would define “workplace hazard” to mean “a physical, chemical, or biological hazard with any potential to cause illness, injury, or death to a person.”

Proposed § 851.101(c)(1) would require a contractor to identify and analyze the work and the hazards at the site, facility, activity and workplace level as appropriate. The proposed regulations do not contemplate that a contractor would need to conduct a comprehensive examination of every workplace for which the contractor is responsible at a site in preparing the worker safety and health program. Rather, a contractor would address those hazards that are common to an entire site on a site-wide basis such as fire protection. Then, to the extent appropriate, a contractor would address the hazards associated with particular facilities or activities on a facility or activity basis. Finally, where a particular workplace presented unique circumstances that might require special attention, a contractor would examine that workplace. In analyzing hazards, a contractor would focus on identifying all the hazards that need to be addressed in the worker safety and health plan rather than producing a quantitative risk analysis.

In addition, proposed § 851.101(c)(4)(C) would require the contractor to describe in sufficient detail the extent to which the program is integrated on a site, facility, activity and workplace level, taking into account differences and similarities between the work, hazards, and workplace safety and health standards. An important part of this description would be the extent of the initial identification and analysis and how further identification and analysis would be conducted in particular workplaces to ensure the flow down of the selected standards and their proper implementation in a manner tailored to fit particular workplace environments. This description also would address coordination among worker safety and health programs at

a site with multiple programs. The guidance documents prepared for integrated safety management systems contain thorough discussions on identifying and analyzing work and hazards. *See, e.g., Integrated Safety Management System Guide*, DOE Guide 450.4-1B (Mar. 1, 2001).

3. Selection of set of workplace safety and health standards.

Central to the worker safety and health program for a workplace is the development of a set of “workplace safety and health standards” that provide a level of protection at least substantially equivalent to the level of protection that existed in comparable DOE workplaces in 2002. Proposed § 851.3 would define a “workplace safety and health standard” to mean “a standard or program which addresses a covered workplace hazard by requiring conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide a safe and healthful covered workplace.” With the exception of the beryllium standard established by 10 CFR part 850, which contractors must continue to comply with, proposed § 851.101(c)(2) and (3) would permit a contractor to select any combination of appropriate workplace safety and health standards that would achieve the required level of protection.

Appendix A to the proposed regulations contains a description of workplace safety and health standards and programs generally acceptable for inclusion in a worker safety and health program. DOE has derived Appendix A from existing DOE Order 440.1A, which sets forth DOE’s expectations for protecting worker safety and health and identifies a number of generally acceptable worker protection standards and programs, including: (1) certain Occupational Health and Safety Administration (OSHA) standards (29 CFR 1910); shipyard employment (29 CFR 1915); marine terminals (29 CFR 1917); health and safety regulations for longshoring (29 CFR 1918); health and safety regulations for construction (29 CFR 1926); and occupational health and safety standards for agriculture (29 CFR 1928); (2) American Conference of Governmental Industrial Hygienists’ threshold limit values for exposures to chemical substances, physical

agents and biological substances where they are more protective than the OSHA standards; (3) certain American National Standards Institute (ANSI) standards (ANSI Z136.1 *Safe Use of Lasers*; ANSI Z88.2 *Practices for Respiratory Protection*; ANSI Z49.1 *Safety in Welding, Cutting and Allied Processes*); (4) the National Fire Protection Association's standards for fire protection and electrical safety; (5) the American Society for Mechanical Engineer's standards for boiler and pressure safety; and (6) programs in areas such as firearms safety, explosives safety, industrial hygiene, occupational medicine, and motor vehicle safety.

Appendix A would serve as a guidance document. With the exception of the beryllium standard, the proposed regulations do not mandate the selection of any particular standard or program, including those described in Appendix A. Rather, the proposed regulations obligate a contractor to focus on the objective of safe and healthy workplaces and to select a set of standards and programs that will achieve a level of protection at least substantially equivalent to the level of protection that existed in comparable DOE workplaces in 2002. DOE would be responsible for reviewing the set of standards and programs that a contractor proposed to select as part of the approval of the contractor's worker safety and health program and for assuring itself those standards and programs would meet that level of protection.

Proposed § 851.101(c)(3)(A) would require the incorporation of chronic beryllium disease prevention programs approved under 10 CFR part 850 into the set of workplace safety and health standards. DOE is proposing several technical and conforming amendments to the current beryllium regulations in part 850 which would align that part with the proposed worker safety and health regulations. The scope of § 850.1 would be amended to state that 10 CFR part 850 provides for establishment of a chronic beryllium disease prevention program (CBDPP) that supplements and is deemed an integral part of the worker safety and health program under 10 CFR part 851. The enforcement provision in § 850.4 would also be amended to state that DOE may take appropriate steps pursuant to 10 CFR part 851 to enforce compliance by

contractors with part 850 and any DOE-approved CBDPP. This would allow DOE to assess civil penalties under 10 CFR part 851 for violations of the CBDPP under 10 CFR part 850.

4. Implementation.

In order for the selected workplace safety and health standards to achieve the required level of protection, the contractor responsible for a workplace must implement them properly in a manner tailored to a particular workplace environment. Proposed § 851.101(c)(4) would require the worker safety and health program to describe how work will be performed in accordance with the selected workplace safety and health standards. This description would identify how the contractor responsible for a workplace would: (1) select and use procedures, controls, and work processes in a tailored manner in particular workplaces to implement the selected standards; and (2) select controls on the basis of the following hierarchy in descending order: engineering controls, administrative controls, work practices, and personal protective equipment. Where appropriate, the program might identify specific procedures, controls and work processes and describe how these procedures, controls and work processes would be used to achieve a tailored implementation. At a minimum, proposed § 851.101(c)(4)(C) would require a description of the process by which the set of selected workplace safety and health standards would flow down to a particular workplace, including how a contractor would select the procedures, controls, and work processes to implement the standards in a tailored manner for particular covered workplaces. This description would address the extent to which the flowdown might require additional analysis at the facility, activity and workplace levels. In addition, proposed §851.101(c)(4)(C) would require a description of how the program was integrated on site, facility, activity and workplace levels, taking into account differences and similarities between the work, hazards, and workplace safety and health standards and, if applicable, coordinated with other worker safety and health programs at the site.

Implementation should focus on workplace hazards that are more likely to cause serious harm to

workers. Accordingly, proposed § 851.101(c)(6) would require the worker safety and health program to prioritize the abatement of hazards on the basis of a qualitative evaluation of the relative risk to workers posed by identified workplace hazards. In addition, proposed § 851.101(c)(7) would require a worker safety and health program to address how implementation would incorporate certain features into the worker safety and health program. These features include line management commitment, information and training, ongoing workplace monitoring and observation, medical surveillance and applicability to subcontractors.

5. Evaluation and feedback.

A key element for a successful worker safety and health program is feedback and continuous improvement. Proposed § 851.101(c)(5) would require a contractor to describe how it will update and maintain the program on a continuous basis. The contractor would describe its procedures and processes for feedback activities such as lessons learned, training, updating, document control, and configuration control that may support a worker safety and health program. Moreover, the process of defining the scope of work, analyzing the hazards associated with the work, and identifying a set of standards should be an iterative process performed continually to provide feedback and improvement. This iterative process would provide a contractor with the information necessary to make continual changes and improvements to all aspects of the program and to comply with proposed § 851.102(c) that would require a contractor to evaluate and update a worker safety and health program to reflect changes in the work and the hazards. In addition to contractor initiated revisions, proposed § 851.102(c)(3) would require a contractor to modify a worker safety and health program to incorporate any changes, conditions, or workplace safety and health standards directed by DOE.

F. Submission, approval and revision of worker safety and health programs.

1. DOE approval.

Beginning one year after publication of the final rule, proposed § 851.102(a) would prohibit work

from being performed at a DOE workplace unless the Program Secretarial Officer (PSO) (which proposed § 851.3 would define as “the Assistant Secretary, Deputy Administrator, Program Office Director, or equivalent DOE official who has primary line management responsibility for a contractor) had approved the worker safety and health program for the workplace on the basis of a determination that the program would achieve a level of protection at least substantially equivalent to the level of protection that existed in comparable DOE workplaces in 2002. A worker protection evaluation report would document the approval and determination. As part of the approval process, the PSO could direct the contractor to modify the worker safety and health program.

To approve the program, DOE would review the content and quality of the worker safety and health program for a DOE site to determine whether the rigor and detail were appropriate for the complexity and hazards expected at workplaces located at the site. DOE also would review the sufficiency of the analysis of work and hazards that supported the program. After approval of a program, DOE would focus its attention on how well a contractor performed in providing safe and healthy workplaces, rather than on the details of how the contractor developed the program.

2. Submittal and compliance dates.

Proposed § 851.102(b) would require a contractor to submit a worker safety and health program to DOE for approval 180 days after publication of the final rule. This date would give a DOE contractor six months to submit a plan after the issuance of the final rule. The Act provides that the regulations shall take effect one year after the promulgation date of the regulations. DOE would not undertake enforcement actions pursuant to this rule on the basis of conduct prior to the effective date. DOE believes these dates should give contractors ample time to submit programs for approval and begin implementation since contractors already have a contractual obligation to have worker protection programs that should satisfy all or most of the requirements set forth in the proposed regulations.

3. Annual update.

Proposed § 851.102(c) would require a contractor to maintain the worker safety and health program for a workplace by evaluating and updating the worker safety and health program to reflect changes in the work and the hazards. On an annual basis, the contractor would have to submit either an updated worker safety and health program to DOE for approval or a letter stating that no changes were necessary in the currently approved worker safety and health program. Annual updates are an important tool in meeting the requirement for continuous feedback and evaluation and allow a contractor to notify DOE of changes occurring during the past year such as new work to be performed, changes in the facility, building of new facilities or decommissioning of old facilities, associated hazards and performance problems. Only those changes in the workplace that have a potential to impact the worker safety and health program would need to be reflected in the worker safety and health program.

G. Guidance Documents

Proposed § 851.8 would explicitly limit the potential role of a “guidance document” as a source of enforceable worker safety and health requirements. DOE would continue to issue guidance documents to assist contractors in developing their worker safety and health programs, including selecting a set of standards and describing implementing procedures, controls, and work processes, but contractors would not be obligated to use them. Rather, contractors’ only obligation would be to comply with the regulations themselves.

Proposed § 851.8 would broadly define the term “guidance document” to include any document that sets forth information related to implementing or otherwise complying with a requirement set forth in the proposed regulations and that DOE has not adopted as a legally binding requirement through notice and comment rulemaking under the Administrative Procedure Act (5 U.S.C. 553). This definition would include proposed Appendices A and B, DOE and industry standards, and any document in the DOE directive system

or other informal statement of policy regardless of which DOE official approved or signed the document.

Use of the terms “shall” or “must” in a guidance document does not change the non-mandatory character and effect of the document.

Proposed § 851.8(a) would make clear to contractors and DOE officials that guidance documents do not create legally enforceable requirements. Proposed § 851.8(b) would prohibit DOE officials from inspecting or investigating a DOE site to identify violations of the proposed regulations by determining whether a contractor’s actions or omissions were consistent with a guidance document. DOE intends that such inspections and investigations will, ordinarily, focus on whether a contractor’s actions or omissions comply with the requirements under its worker safety and health program, or on rare occasions, on whether such actions or omissions comply with requirements of a compliance order issued for cause by the Secretary under § 851.6. Proposed § 851.8(c) would identify the limited circumstances in which a guidance document can give rise to an enforceable requirement. Specifically, a guidance document can give rise to an enforceable requirement only to the extent it is explicitly: (1) included by a contractor in the set of workplace safety and health standards identified pursuant to § 851.101(c)(3)(B) of the proposed regulations; or (2) selected or used by a contractor as a procedure, control, or work process to perform work in a tailored manner for particular covered workplaces in accordance with § 851.101(c)(4) of the proposed regulations. Only in these circumstances may DOE pursue an enforcement action on the basis of action inconsistent with a guidance document and, in these circumstances, DOE would base the enforcement action on a provision of the contractor’s plan and not the guidance document itself.

Proposed § 851.8 would serve two purposes. First, by precluding imposition of a *de facto* set of requirements in the guise of guidance, it would ensure that, as required by section 234C(a)(3) of the AEA, DOE’s implementing regulations include flexibility to tailor implementation of such regulations to reflect

activities and hazards associated with a particular work environment. Put more succinctly, proposed § 851.8 would reinforce site-specific integrated safety management as the guiding principle for the proposed regulations. Second, proposed § 851.8 is responsive to potential contractor criticism that reliance on generally applicable, informal policy directives in the area of worker safety and health instead of duly promulgated rules under the Administrative Procedure Act promotes regulatory instability across the DOE complex which is antithetical to effective integrated safety management and to accomplishment of DOE's national security and research missions. Proposed § 851.8 would thus reinforce the shift from a DOE directive-driven regime characterized by informal DOE policies to a regulatory regime characterized by generally applicable rules that have the force and effect of law with respect to DOE officials, as well as with respect to regulated contractors. Moreover, proposed § 851.8 recognizes the responsibility and obligation of a contractor, in the first instance, to select the procedures, controls, and work processes to use in achieving safe and healthy workplaces and implementing its worker safety and health program.

H. Workers Rights

Workers at DOE sites currently have a number of rights related to assuring a safe and healthy workplace. Proposed § 851.103 would list these rights and make clear that workers may exercise these rights without fear of reprisal. Specifically, the proposed regulations would maintain the rights of workers to: (1) participate in activities described in this section on official time; (2) have access to DOE safety and health publications, the DOE-approved worker safety and health program for the DOE site and the standards, controls and procedures applicable to the covered workplace; (3) observe monitoring or measuring of hazardous agents; (4) have access to monitoring and measuring results and be notified when such results indicate the worker was overexposed to hazardous materials; (5) accompany DOE personnel during an inspection of the workplace; (6) request and receive results of inspections and accident investigations; (7)

express concerns related to worker safety and health; (8) decline to perform an assigned task because of a reasonable belief that, under the circumstances, the task poses an imminent risk of death or serious bodily harm to the worker coupled with a reasonable belief that there is insufficient time to seek effective redress through the normal hazard reporting and abatement procedures; (9) stop work, through the worker's supervisor, when the worker discovers employee exposures to imminent danger conditions or other serious hazards, provided that any stop work authority must be exercised in a justifiable and responsible manner in accordance with established procedures; and (10) have access to an appropriate safety and health poster that informs the worker of relevant rights and responsibilities.

I. Enforcement

1. Civil penalties.

Section 234Cb. of the AEA provides that “a person (or any subcontractor or supplier of the person) who has entered into an agreement of indemnification under section 170d. (or any subcontractor or supplier of the person) that violates (or is the employer of a person that violates) any regulation promulgated under [section 234C] shall be subject to a civil penalty of not more than \$70,000 for each such violation.” For continuing violations, section 234C provides that each day of the violation shall constitute a separate violation for the purposes of computing the civil penalty to be imposed.

Proposed § 851.4(c) would implement this statutory provision by making a contractor whose contract with DOE contains an indemnification agreement (or any subcontractor or supplier thereto) and who violates (or whose employee violates) any requirement of the proposed regulations subject to a civil penalty of not more than \$70,000 for each such violation. In the case of a continuing violation, each day of the violation would constitute a separate violation for the purpose of computing the amount of the civil penalty.

2. Contract fee reductions.

Section 234Cc. of the AEA requires DOE to include provisions in DOE contracts for an appropriate reduction in the fees or amounts paid to the contractor if the contractor or a contractor employee violates the regulations required by section 234C. The Act requires these provisions to be included in each DOE contract with a contractor who has entered into an agreement of indemnification under section 170d. of the AEA (the Price-Anderson Act). The contract provisions must specify the degrees of violations and the amount of the reduction attributable to each degree of violation.

DOE is implementing this statutory mandate to include provisions for the reduction in fees in contracts for violations of this part pursuant to the contract's *Conditional Payment of Fee* clause. Most DOE management and operating contracts currently contain such a clause providing for reductions of earned fee, fixed fee, profit, or share of cost savings that may otherwise be payable under the contract if performance failures relating to environment, safety and health occur. See 48 CFR 970.5215-3, *Conditional Payment of Fee, Profit, or Incentives* (applicable to DOE management and operating contracts and other contracts designated by the Procurement Executive). DOE proposed to amend this clause to set forth the specific criteria and conditions that may precipitate a reduction of earned or fixed fee, profit, or share of cost savings under the contract. The clause would establish reduction ranges that correlate to three specified degrees of performance failures relating to environment, safety and health. See 66 FR 8560 (Feb. 1, 2001) (notice of proposed rulemaking). In the final rule, DOE intends to clarify that the term “environment, health and safety” includes matters relating to “worker health and safety” and to apply the same reduction ranges and degrees of performance failure to worker safety and health. In a parallel provision, proposed § 851.4(b) also would implement this statutory mandate by making a contractor who fails to comply with the requirements of the general rule in proposed § 851.100 subject to a reduction in fees or other payments under a contract with DOE pursuant to the contract's *Conditional Payment of*

Fee clause.

3. Relationship of civil penalties and contract fee reductions.

As a general matter, DOE intends to use civil penalties as the remedy for most violations where DOE may elect between remedies. DOE expects to invoke the provisions for reducing contract fees only in cases involving especially egregious violations or that indicate a general failure to perform under the contract with respect to worker safety and health. Such violations would call into question a contractor's commitment and ability to achieve the fundamental obligation of providing safe and healthy workplaces for workers because of factors such as willfulness, repeated violations, death, serious injury, patterns of systemic violations, flagrant DOE-identified violations, repeated poor performance in an area of concern, or serious breakdown in management controls. Because such violations indicate a general failure to perform under the contract with respect to worker safety and health where both remedies are available and DOE elects to use a reduction in fee, DOE would expect to reduce fees substantially under the *Conditional Payment of Fee* clause.

4. Limitations on penalties.

Section 234Cd. imposes three specific limitations on DOE's authority to seek monetary remedies. Specifically, DOE may not (1) both reduce contract fees and assess civil penalties for the same violation of a worker protection requirement; (2) assess both civil penalties authorized by section 234A (nuclear safety and radiological protection regulations) and by section 234C (worker safety and health regulations) for the same violation; and, (3) with respect to those nonprofit contractors specifically listed as exempt from civil penalties for nuclear safety violations in subsection d. of section 234A of the AEA, assess an aggregate amount of civil penalties and contractor penalties in a fiscal year in excess of the total amount of fees paid by DOE to that nonprofit entity in that fiscal year. Proposed §§ 851.4(d), (e) and (f) sets forth these statutory

limitations.

5. Enforcement procedures.

Proposed subpart C of part 851 sets forth the administrative procedures DOE would use to issue enforcement actions and impose civil penalties. In general, DOE has based these procedures on the existing procedural regulations for nuclear safety enforcement in 10 CFR part 820, which has provided the basis for implementing a successful nuclear safety compliance program since the mid 1990s. *See* Procedural Rules for DOE Nuclear Activities, 10 CFR part 820, 58 FR 43680 (Aug. 17, 1993), *amended*, 62 FR 52481 (Oct. 8, 1997) and 65 FR 15220 (Mar. 22, 2000). The proposed procedures would provide for investigations and inspections, subpoenas, informal conferences, enforcement letters, settlements, consent orders, preliminary notices of violations, and final notices of violations. Contractors would take administrative appeals of final notices of violations to DOE's Office of Hearings and Appeals rather than an administrative law judge as provided for in 10 CFR part 820. Unlike section 234A of the AEA, section 234C does not provide for the use of administrative law judges and other procedural mechanisms. A decision of the Office of Hearings and Appeals would exhaust a contractor's administrative remedies with respect to a final notice of violation and would constitute a final order of DOE.

The proposed regulations would assign responsibility for carrying out these enforcement procedures to the "Director," which proposed § 851.3 would define as "the DOE Official to whom the Secretary has assigned the authority to investigate the nature and extent of compliance with the requirements of" the proposed regulations. DOE expects this function would be assigned to the current Director of the Office of Price-Anderson Enforcement in the Office of Environment, Health and Safety, who is the person to whom the Secretary has assigned the responsibility for enforcing the DOE nuclear safety regulations in 10 CFR parts 820, 830, and 835.

While proposed § 851.201(j) would permit the Director to send an enforcement letter to a contractor to communicate DOE's expectations for compliance with the proposed regulations, the primary responsibility lies with the Program Secretarial Officer for ensuring that a contractor has an approved worker safety and health program that is adequate to achieve a level of protection at least substantially equivalent to the level of protection that existed in 2002 for DOE workplaces comparable to those covered workplaces addressed by the program and that has sufficient detail to allow the Director to conduct inspections or investigations to determine compliance. Proposed § 851.201(j) would make clear that an enforcement letter may not create the basis for any legally enforceable requirement under this part.

With respect to exercising certain functions that might be interpreted as giving direction to DOE's National Nuclear Security Administration's contractors, proposed § 851.206 would make the Administrator of the NNSA responsible for exercising such functions. These functions would be signing and issuing subpoenas, orders to compel attendance, orders disclosing information obtained during an investigation, preliminary notices of violation and final notices of violation. In taking such actions, the NNSA Administrator would consider the Director's recommendations. A similar division of responsibilities has been made for enforcing the DOE nuclear safety regulations under part 820. *See Memorandum of Understanding between NNSA and the Assistant Secretary for Environment, Health and Safety*, Jan. 12, 2001, <http://tis-nt.eh.doe.gov/enforce/handbks/20010108mou.pdf>. Under both part 820 and proposed part 851, the Director would continue to be able to sign enforcement letters and consent orders applicable to NNSA contractors.

6. General Statement of Enforcement Policy.

As a guidance document for enforcing this rule, DOE is proposing to issue a general statement of enforcement policy as Appendix B. The proposed policy would set forth the general framework which

DOE would follow to ensure compliance with the proposed regulations and to issue enforcement actions and exercise civil penalty authority. The proposed policy would not be binding and would not create any legally enforceable requirements pursuant to this part. It would only provide guidance as to how DOE generally expects to seek compliance with the proposed regulations and to deal with any violations of the proposed regulations.

The proposed policy is intended to achieve dual purposes of promoting proactive behavior on the part of DOE contractors to improve worker safety and health performance and of deterring contractors from violating the proposed regulations. The proposed policy would encourage DOE contractors to self-identify, report and correct worker safety and health noncompliances and would provide adjustment factors to escalate or mitigate civil penalties on the basis of the nature of the violation and the behavior of the contractor.

To accomplish these purposes, the proposed policy would incorporate the basic outlines of DOE's well-established nuclear safety enforcement program in part 820. The enforcement policy would utilize the part 820 severity levels I, II, and III and related adjustment factors. These severity levels and adjustment factors in the policy incorporate concepts OSHA uses in its enforcement program including whether a violation is serious, other-than-serious, willful, repeated, or *de minimis*.

Specifically, the proposed policy would provide guidance on the treatment of violations in three severity levels. A severity level I violation would be a serious violation, which would involve the potential that death or serious physical harm could result from a condition in a workplace, or from one or more practices, means, methods, operations, or processes used in connection with a workplace. A severity level I violation would be subject to a base civil penalty of up to 100% of the maximum base civil penalty or \$70,000.

A severity level II violation is an other-than-serious violation, which would involve a potential that the most serious injury or illness that might result from a hazardous condition cannot reasonably be predicted to cause death or serious physical harm to exposed employees but does have a direct relationship to their safety and health. A severity level II violation would be subject to a base civil penalty up to 50% of the maximum base civil penalty or \$35,000.

A severity level III violation is a *de minimis* violation. DOE may evaluate minor noncompliances to determine if generic or specific problems exist and consider them in the aggregate as a more serious violation. A severity level III violation would be subject to a base civil penalty up to 10% of the maximum base civil penalty or \$7,000.

DOE could modify or remit these base civil penalties consistent with mitigation and adjustment factors set forth in the proposed policy. Factors include the gravity, circumstances, and extent of the violation or violations and, with respect to the violator, any history of prior similar violations and the degree of culpability and knowledge. These factors are the same as those used for part 820 and are similar to the adjustment factors in the proposed *Conditional Payment of Fee* rule but the factors in the proposed fee rule include additional focus on performance under the contract.

Regarding the factor of ability of DOE contractors to pay the civil penalties, the policy provides that it is not DOE's intention that the economic impact of a civil penalty would put a DOE contractor out of business. The policy would also provide that when a contractor asserts that it cannot pay the proposed penalty, DOE would evaluate the relationship of affiliated entities to the contractor such as parent corporations.

Based on the adjustment factors relating to a noncompliance, DOE could mitigate a civil penalty from the statutory maximum of \$70,000 per violation per day. Mitigation factors used to reduce a civil

penalty include whether a DOE contractor promptly identified and reported a violation and took effective corrective actions. Factors used to increase penalties (but not over the statutory maximum of \$70,000) would include whether a violation is repeated or involves willfulness, death, serious physical harm, patterns of systemic violations, flagrant DOE-identified violations, repeated poor performance in an area of concern, or serious breakdowns in management controls.

As noted previously, when both remedies are available, DOE may consider a reduction in contract fees if a violation is especially egregious or indicates a general failure to perform under the contract with respect to worker safety and health. In determining whether to refer a violation to the appropriate DOE official responsible for administering reductions in fee pursuant to the *Conditional Payment of Fee* clause, the Director will generally focus on the factors stated above, such as willfulness, repeated violations, death, serious injury, patterns of systemic violations, flagrant DOE-identified violations, repeated poor performance in an area of concern, or serious breakdown in management controls. In cases where DOE may elect between civil penalties and a contract penalty, these kinds of factors may also lead DOE to consider a reduction in fee if they raise doubts about a contractor's overall performance or ability to perform its contract with proper regard for worker safety and health.

In proposing the base civil penalties for the types of violations in this policy, DOE set the starting base amounts at levels higher than the average OSHA penalty for several reasons. DOE's activities are conducted by large, experienced management and operating contractors and their subcontractors and suppliers. Through the contractual relationships that DOE has with these entities, DOE is in constant dialogue concerning the management and operation of DOE's sites and the performance of its governmental missions. DOE has the authority to require these contractors to develop their own worker safety and health programs for DOE approval and to select standards tailored to the work and the hazards. Moreover, DOE

may unilaterally direct contractors to include various provisions in their programs. Thus, the Director is in a position to enforce against these programs and can provide incentives for proactive compliance. The policy strongly encourages self-identification of violations, self-reporting, tracking systems and corrective action programs. Moreover, DOE also has the authority and flexibility to coordinate and choose either a civil penalty or fee reduction remedy based on the enforcement policy and the fee reduction contract clause. The proposed enforcement structure of this rule fits the DOE complex better than would a generic system as found in OSHA's enforcement programs.

Finally, as a tool for implementing the enforcement policy, DOE intends to provide a voluntary computerized database system to allow contractors to report worker safety and health noncompliances. DOE intends to enhance its Noncompliance Tracking System (NTS), currently used for reporting of noncompliances of the DOE nuclear safety requirements, to permit its use for reporting noncompliances with this rule. DOE will develop appropriate reporting thresholds unique to worker safety and health to assure that the system will focus on issues with the greatest potential consequences for worker safety and health.

J. Scope of the rule

1. DOE contractors and DOE-operated workplaces

Proposed § 851.1 would establish the scope of the proposed regulations as governing the conduct of activities by or on behalf of DOE. The regulations would thus apply to activities performed by DOE contractors and by DOE at covered workplaces at DOE sites, except for workplaces regulated by the naval nuclear propulsion program or by the Occupational Safety and Health Administration (OSHA). Proposed § 851.3 would define a "covered workplace" as a place where work is conducted by or on behalf of DOE where DOE has oversight responsibility for safety and health and would define "DOE site" as a DOE-owned or leased area or location where DOE activities and operations are performed at one or more

facilities or locations. While the proposed regulations would obligate a contractor to ensure its employees performed work in accordance with the proposed regulations, the proposed regulations would not make individual employees subject to enforcement actions or the imposition of penalties.

DOE is proposing to limit the scope of the proposed regulations to DOE sites. However, DOE invites public comment concerning whether the proposed regulations also should cover activities performed away from a DOE site, such as transportation.

DOE is also proposing to apply the proposed regulations to covered workplaces operated by DOE. Proposed § 851.9 would require that for DOE-operated workplaces, DOE must ensure that work is performed consistent with the proposed regulations including the establishment, maintenance and implementation of a worker safety and health program. Proposed § 851.9 would apply to government-owned, government-operated facilities related to DOE's mission, including certain laboratories or operations conducted by DOE, as well as general federal government office workplaces in buildings in Washington DC, Germantown, Maryland, or DOE site offices in the field. Thus, this rule is intended to provide protection to workers who are contractor employees and to workers who are federal employees.

Section 234C mandates DOE to promulgate regulations to cover DOE facilities that are operated by contractors covered by agreements of indemnification under the Price-Anderson Act, 42 U.S.C. 2210(d). The proposed regulations go beyond that mandate to continue DOE's current practice of exercising its statutory authority to direct its contractors to perform work in a manner that protects the safety and health of workers, without regard to whether the contractor is covered by an agreement of indemnification. As a practical matter, the Price-Anderson Act requires DOE to include an agreement of indemnification in every contract that has the potential to involve any activity with any risk of a nuclear incident. As a result, nearly all DOE contracts include an agreement of indemnification, with the exception of contracts relating to the

petroleum strategic reserves sites, power administrations, and certain nonnuclear laboratories. While section 234C is not the source of DOE's authority to promulgate the proposed regulations, it is the source of DOE's authority to impose civil penalties. Thus, proposed § 851.4(c) would limit the imposition of civil penalties to contractors covered by an agreement of indemnification. Proposed § 851.4(b) would not limit contractual enforcement actions to contractors covered by an agreement of indemnification since section 234C is not the source of DOE's authority to use contract mechanisms to achieve safe and healthy workplaces.

The proposed regulations also would continue DOE's current practice of exercising its statutory authority to direct its contractors to perform work in a manner that protects the safety and health of workers, without regard to whether the workers are engaged in a nuclear or nonnuclear activity. Section 234C is not limited to nuclear activities in mandating the promulgation of worker protection regulations.

2. OSHA Exclusion.

DOE currently exercises its statutory authority broadly throughout the DOE complex to provide safe and healthful workplaces. In a few cases, however, DOE has elected not to exercise its authority and to defer to regulation by OSHA under the Occupational Safety and Health (OSH) Act (29 U.S.C. 651 *et seq.*). Proposed § 851.2(a)(1) would continue the status quo by not covering those facilities regulated by OSHA on December 2, 2002, the date the NDAA was enacted. The OSHA-regulated facilities are: Western Area Power Administration; Southwestern Power Administration; Southeastern Power Administration; Bonneville Power Administration; National Energy Technology Laboratory (NETL), Morgantown, WV; National Energy Technology Laboratory (NETL), Pittsburgh, PA; Strategic Petroleum Reserve (SPR); National Petroleum Technology Office; Albany Research Center; Naval Petroleum & Oil Shale Reserves in CO, UT, & WY; and Naval Petroleum Reserves in California. See 65 FR 41492 (July 5, 2000).

3. Naval Reactors.

Section 234C explicitly excludes activities conducted under the authority of the Director, Naval Nuclear Propulsion, pursuant to Executive Order 12344, as set forth in Public Law 106-65. Accordingly, proposed § 851.2(a)(2) would exclude workplaces regulated by Naval Reactors.

4. Radiological hazards.

Proposed § 851.2(b) would exclude radiological hazards from the hazards covered by the proposed regulations to the extent they are already regulated by the DOE nuclear safety requirements in 10 CFR parts 820, 830, and 835. These existing rules already deal with radiological hazards in a comprehensive manner through methods such as the Quality Assurance Program Plan, the Safety Basis, the Documented Safety Analysis, and the Radiation Protection Program Plan. The proposed regulations are intended to complement the nuclear safety requirements. Personnel responsible for implementing worker protection and nuclear safety requirements would be expected to coordinate and cooperate in instances where the requirements overlapped. The two sets of requirements should be integrated and applied in a manner that guards against unintended results and provides reasonable assurance of adequate worker protection.

K. Information requirements.

Proposed § 851.5 would require a contractor (1) to maintain complete and accurate records as necessary to substantiate compliance with the proposed regulations; (2) to neither conceal nor destroy any relevant information concerning noncompliance or potential noncompliance with the proposed regulations; and (3) to maintain complete and accurate information in all material respects. Proposed § 851.5(d) would make clear that a contractor must safeguard classified, confidential, and controlled information, including Restricted Data or national security information, in accordance with the applicable provisions of federal statutes and the rules, regulations, and orders of any federal agency.

DOE considered but decided not to propose new reporting requirements in support of the proposed regulations. DOE will continue to use contractual provisions to require contractors to report worker safety and health information which may be used to assess the performance and effectiveness of worker safety and health programs. This information is generally maintained in large, specialized databases which necessitate management flexibility. The primary directive on environment, safety and health reporting that DOE includes in contracts is DOE Order 231.1A. This order requires contractors to record, maintain and post records related to occupational fatalities, injuries, and illnesses occurring among their employees (and subcontractors) arising out of work primarily performed at DOE-owned or -leased facilities. Other relevant reporting directives include occurrence reporting and processing of operations information; performance indicators and analysis of operations information; and accident investigations.

DOE recently has taken steps to eliminate unnecessary reporting requirements related to the subject matter of the proposed regulations. DOE remains committed to reducing the reporting burden where reporting requirements do not contribute to worker safety and health. Accordingly, DOE requests comments on how the reporting burden could be further minimized consistent with that objective. Comments should specify the reporting requirements that give rise to the burden and discuss the reasons for their elimination or suggest how they could be modified to minimize the burden without impairing worker safety and health.

L. Compliance Order.

Proposed § 851.6 would make clear that the Secretary of Energy has the authority to issue a Compliance Order that identifies a situation that violates, potentially violates, or otherwise is inconsistent with a requirement of this part; mandates a remedy, work stoppage, or other action; and states the reasons for the remedy, work stoppage, or other action. The compliance order would be a final order that is effective

immediately. This mechanism is nearly identical to the provisions in 10 CFR 820.41 and is intended to operate in a similar manner.

M. Interpretations by Office of General Counsel.

Proposed § 851.7 would make clear the Office of the General Counsel would have sole responsibility for formulating and issuing any interpretation concerning a requirement in the proposed regulations. Any other written or oral response to any written or oral question would not constitute an interpretation or basis for action inconsistent with the proposed regulations.

III. Procedural Review Requirements.

A. Review under Executive Order 12866.

Today's proposed regulatory action has been determined to be a “significant regulatory action” under Executive Order 12866, “Regulatory Planning and Review” (58 FR 51735, October 4, 1993), as amended by Executive Order 13258 (67 FR 9385, February 26, 2002). Accordingly, DOE submitted this notice of proposed rulemaking to the Office of Information and Regulatory Affairs of the Office of Management and Budget, which has completed its review.

B. Review under Executive Order 12988.

With respect to the review of existing regulations and the promulgation of new regulations, Section 3(a) of Executive Order 12988, “Civil Justice Reform” (61 FR 4779, February 7, 1996) imposes on Federal agencies the general duty to adhere to the following requirements: eliminate drafting errors and needless ambiguity, write regulations to minimize litigation, provide a clear legal standard for affected conduct rather than a general standard, and promote simplification and burden reduction. Section 3(b) requires Federal agencies to make every reasonable effort to ensure that a regulation, among other things: clearly specifies the preemptive effect, if any, adequately defines key terms, and addresses other important

issues affecting the clarity and general draftsmanship under guidelines issued by the Attorney General.

Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in Section 3(a) and Section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, the proposed rule meets the relevant standards of Executive Order 12988.

C. Review under Executive Order 13132.

Executive Order 13132 (64 FR 43255, August 10, 1999), imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. Agencies are required to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and carefully assess the necessity for such actions.

Today's regulatory action has been determined not to be a "policy that has federalism implications," that is, it does not have substantial direct effects on the states, on the relationship between the national government and the states, nor on the distribution of power and responsibility among the various levels of government under Executive Order 13132 (64 FR 43255, August 10, 1999). Accordingly, no "federalism summary impact statement" was prepared or subjected to review under the Executive Order by the Director of the Office of Management and Budget.

D. Review under Executive Order 13175.

Under Executive Order 13175 (65 FR 67249, November 6, 2000) on "Consultation and Coordination with Indian Tribal Governments," DOE may not issue a discretionary rule that has "tribal implications" and imposes substantial direct compliance costs on Indian tribal governments. DOE has determined that the proposed rule would not have such effects and concluded that Executive Order 13175

does not apply to this proposed rule.

E. Review under the Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*) requires that an agency prepare an initial regulatory flexibility analysis for any regulation which a general notice of proposed rulemaking is required, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities (5 U.S.C. 605(b)).

Today's proposed regulation would establish DOE's requirements for worker safety and health at DOE sites. The contractors who manage and operate DOE facilities would be principally responsible for implementing the rule requirements. DOE considered whether these contractors are "small businesses," as that term is defined in the Regulatory Flexibility Act's (5 U.S.C. 601(3)). The Regulatory Flexibility Act's definition incorporates the definition of "small business concern" in the Small Business Act, which the Small Business Administration (SBA) has developed through size standards in 13 CFR part 121. The DOE contractors subject to the proposed rule exceed the SBA's size standards for small businesses. In addition, DOE expects that any potential economic impact of this proposed rule on small businesses would be minimal because DOE sites perform work under contracts to DOE or the prime contractor at the site. DOE contractors are reimbursed through their contracts with DOE for the costs of complying with DOE safety and health program requirements. They would not, therefore, be adversely impacted by the requirements in this proposed rule. For these reasons, DOE certifies that today's proposed rule, if promulgated, would not have a significant economic impact on a substantial number of small entities, and therefore, no regulatory flexibility analysis has been prepared. See 68 FR 7990 at III.1. and III.1.c. (February 19, 2003).

F. Review under the Paperwork Reduction Act.

The information collection provisions of this proposed rule are not substantially different from those

contained in DOE contracts with DOE prime contractors covered by this rule and were previously approved by the Office of Management and Budget (OMB) and assigned OMB Control No. 1910-5103. That approval covered submission of a description of an integrated safety management system required by the *Integration of Environment, Health and Safety into Work Planning and Execution* clause set forth in the DOE procurement regulations. 48 CFR 952.223-71 and 970.5223-1, 62 FR 34842, 34859-60 (June 17, 1997). If contractors at a DOE site fulfill their contractual responsibilities for integrated safety management properly, the worker safety and health program required by the proposed regulations should require little if any new analysis or new documents to the extent that existing analysis and documents are sufficient for purposes of the proposed regulations. Accordingly, no additional Office of Management and Budget clearance is required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) and the procedures implementing that Act, 5 CFR 1320.1 *et seq.*

G. Review Under the National Environmental Policy Act.

DOE currently implements its broad authority to regulate worker safety and health through internal DOE directives incorporated into contracts to manage and operate DOE facilities, contract clauses and DOE regulations. This proposed rule would implement the statutory mandate to promulgate worker safety and health regulations for DOE facilities that would provide a level of protection for workers at DOE facilities that is substantially equivalent to the level of protection currently provided to such workers and to provide procedures to ensure compliance with the rule. DOE anticipates that the contractor's work and safety programs required by this regulation would be based on existing programs and that this rule would generally not require the development of a new program. DOE has therefore concluded that promulgation of these regulations would fall into the class of actions that would not individually or cumulatively have a significant impact on the human environment as set forth in the DOE regulations implementing the National

Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*). Specifically, the rule would be covered under the categorical exclusion in paragraph A6 of Appendix A to Subpart D, 10 CFR Part 1021, which applies to the establishment of procedural rulemakings. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

H. Review under the Unfunded Mandates Reform Act.

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4) requires each Federal agency to prepare a written assessment of the effects of any Federal mandate in a proposed or final agency regulation that may result in the expenditure by states, tribal, or local governments, on the aggregate, or by the private sector, of \$100 million in any one year. The Act also requires a Federal agency to develop an effective process to permit timely input by elected officials of state, tribal, or local governments on a proposed “significant intergovernmental mandate,” and requires an agency plan for giving notice and opportunity to provide timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect small governments. DOE has determined that the proposed rule published today does not contain any Federal mandates affecting small governments, so these requirements do not apply.

I. Review under Executive Order 13211.

Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy, Supply, Distribution, or Use), 66 FR 28355 (May 22, 2001) requires preparation and submission to OMB of a Statement of Energy Effects for significant regulatory actions under Executive Order 12866 that are likely to have a significant adverse effect on the supply, distribution, or use of energy. DOE has determined that the proposed rule published today would not have a significant adverse effect on the supply, distribution, or use of energy and thus the requirement to prepare a Statement of Energy Effects does not apply.

J. Review under the Treasury and General Government Appropriations Act, 1999.

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105-277) requires Federal agencies to issue a “Family Policymaking Assessment” for any proposed rule that may affect family well-being. The proposed rule has no impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

K. Review under the Treasury and General Government Appropriations Act, 2001.

The Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516, note) provides for agencies to review most dissemination of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB. OMB’s guidelines were published at 67 FR 8452 (Feb. 22, 2002), and DOE’s guidelines were published at 67 FR 62446 (Oct. 7, 2002). DOE has reviewed today’s notice of proposed rulemaking under the OMB and DOE guidelines, and has concluded that it is consistent with applicable policies in those guidelines.

IV. Public Comment Procedures

A. Written Comments.

Interested individuals are invited to participate in this proceeding by submitting data, views, or arguments with respect to this proposed rule. Three copies of written comments should be submitted to the address indicated in the **ADDRESSES** section of this notice. To help the DOE review the submitted comments, commenters are requested to reference the paragraph (e.g., § 851.4(a)) to which they refer where possible.

All information provided by commenters will be available for public inspection at the DOE Freedom of Information Reading Room, Room 1E-190, 1000 Independence Avenue, SW, Washington, DC 20585

between the hours of 8:30 a.m. and 4:30 p.m., Monday through Friday, except Federal Holidays. The docket file material for this rulemaking will be under “EH-RM-03-WSH.”

DOE also intends to enter all written comments on a website specially established for this proceeding. The internet website is <http://www.eh.doe.gov/whs/rulemaking>. To assist DOE in making public comments available on a website, interested persons are to submit an electronic version of their written comments in accordance with the instructions in the **DATES** section of this notice of proposed rulemaking.

If you submit information that you believe to be exempt by law from public disclosure, you should submit one complete copy, as well as two copies from which the information claimed to be exempt by law from public disclosure has been deleted. DOE is responsible for the final determination with regard to disclosure or nondisclosure of the information and for treating it accordingly under the Freedom of Information Act section on “Handling Information of a Private Business, Foreign Government, or an International Organization,” 10 CFR 1004.11.

B. Public Hearings.

Public hearings will be held at the time, date, and place indicated in the **DATES** and **ADDRESSES** sections of this notice of proposed rulemaking. Any person who is interested in making an oral presentation should, by 4:30 p.m. on the date specified, make a phone request to the number in the **DATES** section of this notice of proposed rulemaking. The person should provide a daytime phone number where he or she may be reached. Persons requesting an opportunity to speak will be notified as to the approximate time they will be speaking. Each presentation is limited to 10 minutes. Persons making oral presentations should bring three copies of their statement to the hearing and submit them at the registration desk.

DOE reserves the right to select the persons who will speak. In the event that requests exceed the

time allowed, DOE also reserves the right to schedule speakers' presentations and to establish the procedures for conducting the hearing. A DOE official will be designated to preside at each hearing, which will not be judicial or evidentiary. Only those persons conducting the hearing may ask questions. Any further procedural rules needed to conduct the hearing properly will be announced by the DOE presiding official.

A transcript of each hearing will be made available to the public. DOE will retain the record of the full hearing, including the transcript, and make it available on the website specially established for this proceeding. The Internet website is <http://www.eh.doe.gov/whs/rulemaking>. If DOE must cancel the hearing, it will make every effort to give advance notice.

Prior to holding the public hearings, DOE intends to hold one or more informal information workshops to allow contractors, workers and their representatives to familiarize themselves with the proposed regulation. DOE expects to hold these workshops which could include video or telephone conferencing, approximately three weeks after publication of the proposed regulation and will make information on times and locations available as soon as arrangements are finalized.

List of Subjects

10 CFR part 850

Beryllium, Chronic beryllium disease, Hazardous substances, Lung diseases, Occupational safety and health, Reporting and recordkeeping requirements.

10 CFR part 851

Civil penalty, Federal buildings and facilities, Occupational safety and health, Safety, Reporting and recordkeeping requirements

Issued in Washington, DC on December _____, 2003

Beverly Cook

Assistant Secretary of Environment, Safety, and Health

For the reasons set forth in the preamble, the Department of Energy proposes to amend Chapter III of title 10 of the Code of Federal Regulations as follows:

PART 850 – CHRONIC BERYLLIUM DISEASE PREVENTION PROGRAM

1. The authority citation for part 850 is revised to read as follows:

Authority: 42 U.S.C. 2201(i)(3), (p); 42 U.S.C. 2282c; 29 U.S.C. 668; 42 U.S.C. 7101 *et seq.*; 50 U.S.C. 2401 *et seq.*, E.O. 12196, 3 CFR 1981 comp., at 145 as amended.

2. Section 850.1 is revised to read as follows:

§ 850.1 Scope .

This part provides for establishment of a chronic beryllium disease prevention program (CBDPP) that supplements and is deemed an integral part of the worker safety and health program under part 851 of this chapter.

3. Section 850.4 is revised to read as follows:

§ 850.4 Enforcement.

DOE may take appropriate steps pursuant to part 851 of this chapter to enforce compliance by contractors with this part and any DOE-approved CBDPP.

4. A new Part 851 is added to Chapter III to read as follows:

PART 851 – WORKER SAFETY AND HEALTH

Subpart A—General Provisions

Sec.	
851.1	Scope.
851.2	Exclusions.
851.3	Definitions.
851.4	Enforcement.
851.5	Information and records.
851.6	Compliance Order.
851.7	Interpretation.
851.8	Guidance documents.
851.9	DOE operated workplaces.

Subpart B--Worker Safety and Health Program

851.100	General rule.
851.101	Worker safety and health program.
851.102	DOE approval of worker safety and health program.
851.103	Worker rights.

Subpart C--Enforcement Process

851.200	Purpose.
851.201	Investigations and inspections.
851.202	Settlement.
851.203	Preliminary notice of violation.
851.204	Final notice of violation.
851.205	Administrative appeal.
851.206	Direction to NNSA contractors.

APPENDIX A TO PART 851--GENERALLY ACCEPTABLE WORKER SAFETY AND HEALTH STANDARDS AND PROGRAMS

APPENDIX B TO PART 851--GENERAL STATEMENT OF ENFORCEMENT POLICY

AUTHORITY: 42 U.S.C. 2201(i)(3), (p); 42 U.S.C. 2282c; 42 U.S.C. 5801 *et seq.*; 42 U.S.C. 7101 *et seq.*; 50 U.S.C. 2401 *et seq.*

Subpart A--General Provisions

§ 851.1 Scope.

This part governs the conduct of activities at DOE sites by or on behalf of DOE.

§ 851.2 Exclusions.

(a) This part does not apply to a DOE site:

(1) Regulated by the Occupational Safety and Health Administration (OSHA) on December 2, 2002; or

(2) Operated under the authority of the Director, Naval Nuclear Propulsion, pursuant to Executive Order 12344, as set forth in Public Law 98-525, 42 U.S.C. 7158 note.

(b) This part does not apply to radiological hazards to the extent regulated by 10 CFR parts 820, 830, or 835.

§ 851.3 Definitions.

The following definitions apply to this part:

AEA means the Atomic Energy Act of 1954, 42 U.S.C. 2011 *et seq.*

Consent order means any written document, signed by the Director and a contractor, containing stipulations or conclusions of fact or law and a remedy acceptable to both DOE and the contractor.

Contractor means any entity, including affiliated entities such as a parent corporation, under contract with DOE (or any subcontractor or supplier thereto).

Covered workplace means a place where work is conducted by or on behalf of DOE where DOE has oversight responsibility for safety and health.

DOE means the United States Department of Energy, including the National Nuclear Security Administration.

DOE site means a DOE-owned or leased area or location where activities and operations are performed at one or more facilities or locations by or on behalf of DOE.

Director means the DOE Official(s) to whom the Secretary has assigned the authority to investigate the nature and extent of compliance with the requirements of this part.

Final notice of violation means a document that determines a contractor has violated or is

continuing to violate a requirement of this part and includes:

- (1) A statement specifying the requirement of this part to which the violation relates;
- (2) A concise statement of the basis for the determination;
- (3) Any remedy, including the amount of any civil penalty; and
- (4) A statement explaining the reasoning behind any remedy.

Final Order means an order of DOE that represents final agency action and, where appropriate, imposes a remedy with which the recipient of the order must comply.

General Counsel means the General Counsel of DOE.

Guidance Document means a document that sets forth information related to implementing or otherwise complying with a requirement of this part and that DOE has not adopted as a legally binding requirement through notice and comment rulemaking under the Administrative Procedure Act (5 U.S.C. 553).

Interpretation means a statement by the General Counsel concerning the meaning or effect of a requirement of this part which relates to a specific factual situation but may also be a ruling of general applicability where the General Counsel determines such action to be appropriate.

National security workplace means a covered workplace where national security missions are performed.

NNSA means the National Nuclear Security Administration.

Preliminary notice of violation means a document that sets forth the preliminary conclusions that a contractor has violated or is continuing to violate a requirement of this part and includes:

- (1) A statement specifying the requirement of this part to which the violation relates;
- (2) A concise statement of the basis for alleging the violation;

(3) Any remedy, including the amount of any proposed civil penalty; and

(4) A statement explaining the reasoning behind any proposed remedy.

Program Secretarial Officer (PSO) means the Assistant Secretary, Deputy Administrator, Program Office Director, or equivalent DOE official who has primary line management responsibility for a contractor.

Remedy means any action necessary or appropriate to rectify, prevent, or penalize a violation of a requirement of this part, including a compliance order, the assessment of civil penalties, the reduction of fees or other payments under a contract, the requirement of specific actions, or the modification, suspension or rescission of a contract.

Secretary means the Secretary of Energy.

Transitional workplace means a covered workplace that is, or is expected to be, permanently closed and that is expected to be demolished, or title to which is expected to be transferred to another entity for reuse on behalf of an entity other than DOE.

Worker means an employee who performs work at a covered workplace.

Worker protection evaluation report means the report prepared by DOE to document the basis for approval by DOE of a worker safety and health program, including any conditions for approval.

Worker safety and health program means a program that provides reasonable assurance of a safe and healthful workplace.

Workplace hazard means a physical, chemical, or biological hazard with any potential to cause illness, injury, or death to a person.

Workplace safety and health standard means a standard or program which addresses a workplace hazard by requiring conditions, or the adoption or use of one or more practices, means, methods,

operations, or processes, reasonably necessary or appropriate to provide a safe and healthful workplace.

§ 851.4 Enforcement.

(a) The requirements in this part are subject to enforcement by all appropriate means.

(b) A contractor that violates (or whose employee violates) § 851.100 of this part is subject to a reduction in fees or other payments under a contract with DOE, pursuant to the contract's *Conditional Payment of Fee* clause.

(c) A contractor who has entered into an agreement of indemnification under section 170d. of the AEA (or any subcontractor or supplier thereto) and who violates (or whose employee violates) any requirement of this part is subject to a civil penalty of not more than \$70,000 for each such violation. If any violation under this subsection is a continuing violation, each day of the violation shall constitute a separate violation for the purpose of computing the civil penalty.

(d) DOE may not penalize a contractor under both paragraphs (b) and (c) of this section for the same violation of a requirement of this part.

(e) In the case of an entity described in subsection d. of section 234A of the AEA, the total amount of contract penalties under paragraph (b) and civil penalties under paragraph (c) of this section in a fiscal year may not exceed the total amount of fees paid by DOE to that entity in that fiscal year.

(f) DOE may not penalize a contractor under both sections 234A and 234C of the AEA for the same violation.

§ 851.5 Information and records.

(a) A contractor must maintain complete and accurate records as necessary to substantiate compliance with the requirements of this part.

(b) A contractor may neither conceal nor destroy any information concerning noncompliance or

potential noncompliance with the requirements of this part.

(c) Any information pertaining to a requirement in this part provided to DOE by any contractor or maintained by any contractor for inspection by DOE shall be complete and accurate in all material respects.

(d) Nothing in this part shall relieve any contractor from safeguarding classified, confidential, and controlled information, including Restricted Data or national security information, in accordance with the applicable provisions of federal statutes and the rules, regulations, and orders of any federal agency.

§ 851.6 Compliance Order.

(a) The Secretary may issue to any contractor a Compliance Order that:

(1) Identifies a situation that violates, potentially violates, or otherwise is inconsistent with a requirement of this part;

(2) Mandates a remedy, work stoppage, or other action; and,

(3) States the reasons for the remedy, work stoppage, or other action.

(b) A Compliance Order is a final order that is effective immediately unless the Order specifies a different effective date.

(c) Within 15 calendar days of the issuance of a Compliance Order, the recipient of the Order may request the Secretary to rescind or modify the Order. A request does not stay the effectiveness of a Compliance Order unless the Secretary issues an order to that effect.

§ 851.7 Interpretation.

(a) The Office of the General Counsel is solely responsible for formulating and issuing any interpretation concerning a requirement in this part.

(b) Any written or oral response to any written or oral question which is not provided pursuant to paragraph (a) of this section does not constitute an interpretation and does not provide any basis for action

inconsistent with a requirement of this part.

§ 851.8 Guidance documents.

(a) Except as provided in paragraph (c) of this section, a guidance document does not establish any requirement legally enforceable pursuant to this part.

(b) Except as provided in paragraph (c) of this section, DOE may not conduct an inspection or investigation to determine compliance with this part on the basis of whether a contractor's actions or omissions are inconsistent with a guidance document.

(c) A provision of a guidance document is legally enforceable pursuant to this part only to the extent it is explicitly:

(1) Included by a contractor in the set of workplace safety and health standards identified pursuant to § 851.101(c)(3)(ii)(B) of this part; or

(2) Selected or used by a contractor as a procedure, control, or work process to perform work in a tailored manner for particular covered workplaces in accordance with § 851.101(c)(4).

§ 851.9 DOE operated workplaces.

With respect to a covered workplace operated by DOE, DOE must ensure work is performed consistent with the requirements of this part, including the establishment, maintenance and implementation of a worker safety and health program.

Subpart B--Worker Safety and Health Program

§ 851.100 General rule.

The contractor responsible for a covered workplace must ensure:

(a) The covered workplace is free from recognized hazards that are causing or are likely to cause death or serious bodily harm; and

(b) Work is performed in accordance with the worker safety and health program for the covered workplace, as approved by DOE.

§ 851.101 Worker safety and health program.

(a) A contractor responsible for one or more workplaces at a DOE site must establish and maintain a worker safety and health program for those workplaces.

(b) A worker safety and health program must:

(1) Provide for eliminating, limiting or mitigating the identified workplace hazards in a manner that is necessary and sufficient to provide adequate protection of workers; and

(2) Be tailored to reflect the activities and hazards in particular work environments.

(c) In establishing a worker safety and health program, a contractor must:

(1) Identify and analyze, as appropriate at the site, facility, activity and workplace level:

(i) The work to be performed;

(ii) The work environment, including designs and features of facilities, equipment, operations and procedures important to a safe and healthful workplace;

(iii) Existing and potential workplace hazards; and

(iv) The risk of worker injury or illness associated with the identified workplace hazards.

(2) Include a set of workplace safety and health standards that achieves a level of protection at least substantially equivalent to the level of protection that existed in comparable DOE workplaces in 2002;

(3) Select and document the included set of workplace safety and health standards that are necessary and sufficient to provide adequate protection of workers:

(i) With respect to beryllium, by incorporating the chronic beryllium disease prevention program adopted pursuant to part 850 of this chapter; and

(ii) With respect to other workplace hazards identified and analyzed pursuant to (c)(1) of this section by identifying and incorporating a set of provisions that are necessary and sufficient to protect workers from the identified hazards, provided that the set is based on:

(A) The workplace safety and health standards in Appendix A of this part;

(B) Other workplace safety and health standards; or

(C) A combination of the workplace safety and health standards in paragraphs (c)(3)(ii)(A) and (c)(3)(ii)(B) of this section.

(4) Describe in sufficient detail how work will be performed in accordance with the set of selected workplace safety and health standards, including:

(i) Selection process and use of procedures, controls, and work processes in a tailored manner for particular covered workplaces;

(ii) Preference for implementation on the basis of the following hierarchy in descending order: engineering controls, administrative controls, work practices, and personal protective equipment; and

(iii) Integration of the program on site, facility, activity and workplace levels, taking into account differences and similarities between the work, hazards, and workplace safety and health standards and, if applicable, coordination with other worker safety and health programs at the site;

(5) Describe how feedback and continuous improvement will be provided for elements of the worker safety and health program.

(6) Prioritize the abatement of hazards on the basis of risks to workers;

(7) Address how the following features will be incorporated into the worker safety and health program:

(i) Line management commitment;

- (ii) Information and training;
- (iii) Ongoing workplace monitoring and observation;
- (iv) Medical surveillance; and
- (v) Applicability to subcontractors.

(d)(1) If a contractor is responsible for more than one covered workplace at a DOE site, the contractor must establish and maintain a single worker safety and health program for the workplaces at the site for which the contractor is responsible

(2) If more than one contractor is responsible for covered workplaces at a DOE site, each contractor must:

(i) Establish and maintain a worker safety and health program for the workplaces for which the contractor is responsible; and

(ii) Coordinate with the other contractors responsible for covered workplaces at the site to ensure that the worker safety and health programs at the site are integrated and consistent.

(e) If a worker safety and health program sets forth a reasonable basis for characterizing particular workplaces as:

(1) Transitional workplaces, it must provide sufficient flexibility to take into account the special circumstances of those workplaces; or

(2) National security workplaces, it must provide sufficient flexibility to achieve national security missions in an efficient and timely manner in those workplaces.

§ 851.102 DOE approval of worker safety and health program.

(a) Beginning one year after publication of the final rule, no work may be performed at a covered workplace unless the PSO has approved the worker safety and health program for the workplace through

the issuance of a worker protection evaluation report that determines the worker safety and health program will achieve a level of protection at least substantially equivalent to the level of protection that existed in 2002 for DOE workplaces comparable to those covered workplaces addressed by the program.

(b) Within 180 days after publication of the final rule, a contractor responsible for establishing a worker safety and health program must submit for DOE approval a worker safety and health program that meets the requirements of this subpart.

(c) A contractor must maintain a worker safety and health program by:

(1) Evaluating and updating the worker safety and health program to reflect changes in the activities and hazards;

(2) Annually submitting to DOE either an updated worker safety and health program for approval or a letter stating that no changes are necessary in the currently approved worker safety and health program; and

(3) Incorporating in the worker safety and health program any changes, conditions, or workplace safety and health standards directed by DOE.

§ 851.103 Worker rights.

A worker at a covered workplace has the right, without reprisal, to:

(a) Participate in activities described in this section on official time;

(b) Have access to:

(1) DOE safety and health publications;

(2) The DOE-approved worker safety and health program for the covered workplace; and

(3) The standards, controls and procedures applicable to the covered workplace;

(c) Observe monitoring or measuring of hazardous agents;

- (d) Have access to monitoring and measuring results and be notified when such results indicate the worker was overexposed to hazardous materials;
- (e) Accompany DOE personnel during an inspection of the workplace;
- (f) Request and receive results of inspections and accident investigations;
- (g) Express concerns related to worker safety and health;
- (h) Decline to perform an assigned task because of a reasonable belief that, under the circumstances, the task poses an imminent risk of death or serious bodily harm to the worker coupled with a reasonable belief that there is insufficient time to seek effective redress through the normal hazard reporting and abatement procedures;
- (i) Stop work, through the worker's supervisor, when the worker discovers employee exposures to imminently dangerous conditions or other serious hazards; provided that any stop work authority must be exercised in a justifiable and responsible manner in accordance with established procedures; and
- (j) Have access to an appropriate safety and health poster that informs the worker of relevant rights and responsibilities.

Subpart C--Enforcement Process

§ 851.200 Purpose.

This subpart establishes the procedures for investigating the nature and extent of a violation of the requirements of this part, for determining whether a violation of a requirement of this part has occurred, and for imposing an appropriate remedy.

§ 851.201 Investigations and inspections.

- (a) The Director may initiate and conduct investigations and inspections relating to the scope, nature and extent of compliance by a contractor with the requirements of this part and take such action as the

Director deems necessary and appropriate to the conduct of the investigation or inspection.

(b) Any person may request the Director to initiate an investigation or inspection pursuant to paragraph (a) of this section. A request for an investigation or inspection sets forth the subject matter or activity to be investigated or inspected as fully as possible and includes supporting documentation and information.

(c) The Director must inform any contractor that is the subject of an investigation or inspection in writing at the initiation of the investigation or inspection of the general purpose of the investigation or inspection.

(d) DOE shall not disclose information or documents that are obtained during any investigation or inspection unless the Director directs or authorizes the public disclosure of the investigation. Upon such authorization, the information or documents are a matter of public record and disclosure is not precluded by the Freedom of Information Act, 5 U.S.C. 552 and part 1004 of this title.

(e) A request for confidential treatment of information for purposes of the Freedom of Information Act does not prevent disclosure by the Director if the Director determines disclosure to be in the public interest and otherwise permitted or required by law.

(f) During the course of an investigation or inspection, any contractor may submit any document, statement of facts or memorandum of law for the purpose of explaining the contractor's position or furnish information which the contractor considers relevant to a matter or activity under investigation or inspection.

(g) The Director may convene an informal conference to discuss any situation that might be a violation of a requirement of this part, its significance and cause, any correction taken or not taken by the contractor, any mitigating or aggravating circumstances, and any other useful information. A conference is not normally open to the public and DOE does not make a transcript of the conference. The Director may

compel a contractor to attend the conference.

(h) If facts disclosed by an investigation or inspection indicate that further action is unnecessary or unwarranted, the Director may close the investigation without prejudice to further investigation or inspection at any time that circumstances so warrant.

(i) If facts disclosed by an investigation or inspection indicate that corrective action is necessary or warranted, the Director may issue an enforcement letter that closes the investigation subject to the implementation of the corrective actions identified in the enforcement letter.

(j) The Director may issue enforcement letters that communicate DOE's expectations with respect to any aspect of the requirements of this part, including identification and reporting of issues, corrective actions, and implementation of the contractor's safety and health program; provided that an enforcement letter may not create the basis for any legally enforceable requirement pursuant to this part.

(k) The Director may sign, issue and serve subpoenas.

§ 851.202 Settlement.

(a) DOE encourages settlement of a proceeding under this subpart at any time if the settlement is consistent with this part. The Director and a contractor may confer at any time concerning settlement. A settlement conference is not open to the public and DOE does not make a transcript of the conference.

(b) Notwithstanding any other provision of this part, the Director may resolve any issues in an outstanding proceeding under this subpart with a consent order.

(1) The Director and the contractor, or a duly authorized representative, must sign the consent order and indicate agreement to the terms contained therein.

(2) A contractor does not need to admit in a consent order that a requirement of this part has been violated.

(3) DOE does not need to make a finding in a consent order that a contractor has violated a requirement of this part.

(4) A consent order must set forth the relevant facts which form the basis for the order and what remedy, if any, is imposed.

(5) A consent order shall constitute a final order.

§ 851.203 Preliminary notice of violation.

(a) Based on a determination by the Director that there is a reasonable basis to believe a contractor has violated or is continuing to violate a requirement of this part, the Director may issue a preliminary notice of violation to the contractor.

(b) The Director must send a preliminary notice of violation by certified mail, return receipt requested.

(c) A preliminary notice of violation must indicate:

- (1) The date, facts, and nature of each act or omission upon which each alleged violation is based;
- (2) The particular provision of the regulation involved in each alleged violation;
- (3) The proposed remedy for each alleged violation, including the amount of any civil penalty; and
- (4) The right of the contractor to submit a written reply to the Director within 30 calendar days of receipt of the preliminary notice of violation.

(d) A reply to a preliminary notice of violation must contain a statement of all relevant facts pertaining to an alleged violation.

(1) The reply must:

- (i) State any facts, explanations and arguments which support a denial of the alleged violation;
- (ii) Demonstrate any extenuating circumstances or other reason why a proposed remedy should not

be imposed or should be mitigated;

(iii) Discuss the relevant authorities which support the position asserted, including rulings, regulations, interpretations, and previous decisions issued by DOE; and

(iv) Furnish full and complete answers to any questions set forth in the preliminary notice.

(2) Copies of all relevant documents must be submitted with the reply.

(e) If a contractor fails to submit a written reply within 30 calendar days of receipt of a preliminary notice of violation:

(1) The contractor relinquishes any right to appeal any matter in the preliminary notice; and

(2) The preliminary notice, including any proposed remedies therein, constitutes a final order.

§ 851.204 Final notice of violation.

(a) If a contractor submits a written reply within 30 calendar days of receipt of a preliminary notice of violation, the Director must review the submitted reply and make a final determination whether the contractor violated or is continuing to violate a requirement of this part.

(b) Based on a determination by the Director that a contractor has violated or is continuing to violate a requirement of this part, the Director may issue to the contractor a final notice of violation that states concisely the determined violation and any remedy, including the amount of any civil penalty imposed on the contractor. The final notice of violation must state that the contractor may petition the Office of Hearings and Appeals for review of the final notice in accordance with 10 CFR part 1003, subpart G.

(c) The Director must send a final notice of violation by certified mail, return receipt requested.

(d) If a contractor fails to submit a petition for review to the Office of Hearings and Appeals within 30 calendar days of receipt of a final notice of violation pursuant to § 851.205:

(1) The contractor relinquishes any right to appeal any matter in the final notice; and

(2) The final notice, including any remedies therein, constitutes a final order.

§ 851.205 Administrative appeal.

(a) Any contractor that receives a final notice of violation may petition the Office of Hearings and Appeals for review of the final notice in accordance with part 1003, subpart G of this title, within 30 calendar days from receipt of the final notice.

(b) In order to exhaust administrative remedies with respect to a final notice of violation, the contractor must petition the Office of Hearings and Appeals for review in accordance with paragraph (a) of this section.

§ 851.206 Direction to NNSA contractors.

(a) Notwithstanding any other provision of this part, the NNSA Administrator, rather than the Director, signs, issues and serves the following actions that direct NNSA contractors:

- (1) Subpoenas;
 - (2) Orders to compel attendance;
 - (3) Disclosures of information or documents obtained during an investigation or inspection;
 - (4) Preliminary notices of violations; and
 - (5) Final notices of violations.
- (b) The NNSA Administrator shall act after consideration of the Director's recommendation.

**APPENDIX A TO PART 851—GENERALLY ACCEPTABLE WORKER SAFETY AND
HEALTH STANDARDS AND PROGRAMS**

I. Safety and Health Standards.

- A. Title 29 of the Code of Federal Regulations (CFR), Part 1910, "Occupational Safety and Health Standards."

- B. Title 29 CFR Part 1915, "Shipyard Employment."
- C. Title 29 CFR Part 1917, "Marine Terminals."
- D. Title 29 CFR Part 1918, "Safety and Health Regulations for Longshoring."
- E. Title 29 CFR Part 1926, "Safety and Health Regulations for Construction."
- F. Title 29 CFR Part 1928, "Occupational Safety and Health Standards for Agriculture."
- G. American Conference of Governmental Industrial Hygienists (ACGIH), "Threshold Limit Values for Chemical Substances and Physical Agents and Biological Exposure Indices" (most recent edition), when ACGIH Threshold Limit Values (TLVs) are lower (more protective) than Occupational Safety and Health Administration (OSHA) Permissible Exposure Limits. When ACGIH TLVs are used as exposure limits, DOE operations must nonetheless comply with the other provisions of any applicable OSHA-expanded health standard.
- H. Exposure limits and technical requirements of the American National Standards Institute (ANSI) Z136.1, *Safe Use of Lasers*.
- I. ANSI Z88.2, *Practices for Respiratory Protection*.
- J. ANSI Z49.1, *Safety in Welding, Cutting and Allied Processes*, Sections 4.3 and E4.3 (of the 1994 edition or equivalent sections of subsequent editions).
- K. National Fire Protection Association (NFPA) 70, *National Electrical Code*.
- L. National Fire Protection Association 70E, *Electrical Safety Requirements for Employee Workplaces*.
- M. Appropriate etiologic agents guidelines and best practices. See most current edition of U.S. Department of Health and Human Services Centers for Disease Control and Prevention (CDC) Publication 93-8395, *Biosafety in Microbiological and Biomedical Laboratories*; National

Institutes of Health (NIH) publication *Guidelines for Research Involving Recombinant DNA Molecules*; and World Health Organization (WHO) publication *Guidelines for the Safe Transport of Infectious Substances and Diagnostic Specimens*.

II Safety and Health Programs.

A. Construction Safety.

1. For each construction operation presenting hazards not experienced in previous project operations or for work performed by a different subcontractor, the construction contractor prepares a task analysis (job hazard analysis) and has it approved prior to commencement of affected work. These analyses identify foreseeable hazards and planned protective measures, provide drawings and/or other documentation of protective measures that a Professional Engineer or other competent person is required to prepare, and define the qualifications of competent persons required for workplace inspections.

2. Inform workers of foreseeable hazards and the protective measures described within the approved task analysis prior to beginning work on the affected construction operation.

3. During periods of active construction, the construction manager has a designated representative on site at all times to conduct and document daily inspections of the workplace; to identify and correct hazards and instances of noncompliance with project safety and health requirements. If immediate corrective action is not possible or the hazard falls outside of project scope, the construction contractor immediately notify affected workers, post appropriate warning signs, implement needed interim control measures, and notify the construction manager of actions taken.

4. The construction contractor prepares and has approved prior to beginning any on-site project work a written project safety and health plan that gives a proposal for implementing the above information. The construction contractor also designates the individual(s) responsible for on-site implementation of the

plan, specify qualifications for those individuals, and provide a list of those project operations for which a task analysis is to be performed.

B. Fire Protection.

1. Implement a comprehensive fire protection program that includes appropriate facility and site-wide fire protection, fire alarm notification and egress features, and access to a fully staffed, trained, and equipped fire department that is capable of responding in a timely and effective manner to site emergencies.

2. An acceptable fire protection program includes those fire protection criteria and procedures, analyses, hardware and systems, apparatus and equipment, and personnel. This also includes meeting the applicable building code and National Fire Protection Association Codes and Standards or exceeding them (when necessary to meet safety objectives), unless DOE has granted explicit written relief.

3. Fire watcher requirements in National Fire Protection Association (NFPA) 51B, Section 3-3.3 (of the 1994 edition or equivalent section of subsequent editions), are expanded to include responsibility for the safety of the welder(s) in addition to that of the facility.

C. Firearms Safety.

1. Establish firearms safety policies and procedures to address safety concerns and the personal protective equipment required. Establish procedures for: storage, handling, cleaning, and maintenance of firearms and associated ammunition; activities such as loading, unloading, and exchanging firearms; use of pyrotechnics and/or explosive projectiles; handling misfires and duds; live fire operations; and training and exercises using engagement simulation systems.

2. Staff members responsible for the direction and operation of the firearms safety program are professionally qualified and have sufficient time and authority to implement the established program.

Firearms instructors and armorers are Safeguards and Security Central Training Academy-certified to

conduct the level of activity provided.

3. Conduct formal appraisals assessing implementation of procedures, personnel responsibilities, and duty assignments to ensure overall policy objectives and performance criteria are being met by qualified safety personnel.

4. Implement provisions related to firearms safety training, qualification, or re-qualification.

Personnel successfully complete and demonstrate understanding of initial firearms safety training before being issued any firearms.

(a) Personnel authorized to carry firearms have access to instruction manuals for each type of duty firearms with which they are armed while on duty. Authorized armed personnel demonstrate both technical and practical knowledge of firearms handling and safety on a semi-annual basis. This demonstration supported by limited scope performance tests, and documents the results of such testing.

(b) All firearms training lesson plans incorporate safety for all aspects of firearms training task performance standards. The lesson plans follow the standards and criteria set forth by the Safeguards and Security Central Training Academy's standard training programs. Conduct safety briefings before any live fire training commences, in accordance with DOE M 473.2-1, *Firearms Qualification Courses Manual*.

(c) Develop a safety analysis and have approved by the Operations Office Manager for the facilities and operation of each live fire range. Complete and have approved a safety analysis prior to implementation of any new training. Incorporate the results of these analyses into procedures, lesson plans, exercise plans, and limited scope performance tests.

(d) Post site-specific firing range safety procedures at all ranges.

(e) Request approval from the DOE Operations Office for the location and use of a live fire range.

5. Transportation, handling, placarding, and storage of munitions conform to the applicable

requirements of DOE M 440.1-1, *DOE Explosives Safety Manual*.

D. Explosives Safety.

Applicable explosives operations comply with DOE M 440.1-1. Contractor facility management determines the applicability of the requirements to research and development laboratory type operations consistent with the DOE level of protection criteria in the Manual. The administration and management of the Explosives Safety Manual and any deviations from it follows the process specified in Chapter I, Sections 3 and 4, of the Manual. Revisions to the Manual are made through concurrence of the DOE Explosives Safety Committee.

E. Industrial Hygiene.

Industrial hygiene programs include the following elements:

1. Initial or baseline surveys of all work areas or operations to identify and evaluate potential worker health risks and periodic resurveys and/or exposure monitoring as appropriate.

2. Coordination with planning and design personnel to anticipate and control health hazards that proposed facilities and operations would introduce.

3. Documented exposure assessment for chemical, physical, and biological agents and ergonomic stressors using recognized exposure assessment methodologies and use of accredited industrial hygiene laboratories.

4. Specification of appropriate controls based on the following hierarchy: engineering; work practices; and personal protective equipment to limit hazardous exposure to acceptable levels. Use of respiratory protection equipment tested under the DOE Respirator Acceptance Program when National Institute for Occupational Safety and Health-approved respiratory protection does not exist for DOE tasks. For security operations conducted in accordance with Presidential Directive Decision 39, U.S. Policy on

Counter Terrorism, use of Department of Defense military type masks for respiratory protection by security personnel is acceptable.

5. Professionally and technically qualified industrial hygienists to manage and implement the industrial hygiene program.

F. Occupational Medicine.

1. The earliest possible detection and mitigation of occupational illness and injury is the goal of these services. The physician responsible for delivery of medical services is responsible for the planning and implementation of the occupational medical program.

2. Maintenance of a Healthful Work Environment.

(a) The responsible physician performs targeted examinations based on an up-to-date knowledge of work site risk; identify potential or actual health effects resulting from worksite exposures; and communicate the results of health evaluations to management and to those responsible for mitigating worksite hazards.

(b) Contractor management provides to the physician employee job task and hazard analysis information; and summaries of potential worksite exposures of employees prior to mandatory health examinations.

3. Employee Health Examinations. Health examinations are conducted by an occupational health examiner under the direction of a licensed physician in accordance with current sound and acceptable medical practices. The content of health examinations is the responsibility of the physician responsible for the delivery of medical services.

(a) The following classes of examinations are for providing initial and continuing assessment of employee health: pre-placement in accordance with the Americans with Disabilities Act (42 U.S.C. 12101);

qualification examinations; fitness for duty; medical surveillance and health monitoring; return to work health evaluations; and termination examinations.

(b) The physician or his/her designee informs contractor management of appropriate employee work restrictions.

4. Monitored Care. Contractor management notifies the physician responsible for the delivery of medical services or his or her designee when an employee has been absent because of an injury or illness for more than 5 consecutive workdays or experiences excessive absenteeism.

5. Employee Counseling and Health Promotion. The physician responsible for delivery of medical services reviews and approves the medical aspects of contractor-sponsored or –supported employee assistance, alcohol, and other substance abuse rehabilitation programs; approve and coordinate all contractor-sponsored or -supported wellness programs; and ensure that immunization programs for blood-borne pathogens and biohazardous waste programs conform to OSHA regulations and Centers for Disease Control guidelines for those employees at risk to these forms of exposure.

6. Medical Records. Develop and maintain an employee medical record for each employee for whom medical services are provided. Observe employee medical records confidentiality, adequately protect and permanently store them.

7. Emergency and Disaster Preparedness. The physician responsible for the delivery of medical services is responsible for the medical portion of the site emergency and disaster plan. Integrate the medical portion with the overall site plan and with the surrounding community emergency and disaster plan.

8. Organizational Staffing. Ensure that the physician responsible for the delivery of medical services is a graduate of a school of medicine or osteopathy who meets the licensing requirements applicable to the location in which the physician works. Occupational medical physicians, occupational health nurses,

physician's assistants, nurse practitioners, psychologists, and other occupational health personnel are graduates of accredited schools and is licensed, registered, or certified as required by Federal or State law where employed.

G. Pressure Safety.

1. Establish safety policies and procedures to ensure pressure systems are designed, fabricated, tested, inspected, maintained, repaired, and operated by trained and qualified personnel in accordance with applicable and sound engineering principles.

2. Ensure that all pressure vessels, boilers, air receivers, and supporting piping systems conform to the American Society of Mechanical Engineers (ASME) Boiler and Pressure Vessel Safety Code; the American National Standards Institute/ASME B.31 Piping Code; and/or the strictest applicable state and local codes.

3. When national consensus codes are not applicable (because of pressure range, vessel geometry, use of special materials, etc.), implement measures to provide equivalent protection and ensure safety equal to or superior to the intent of the ASME code. Measures include the following:

(a) Design drawings, sketches, and calculations are reviewed and approved by an independent design professional. Documented organizational peer review is acceptable.

(b) Qualified personnel are used to perform examinations and inspections of materials, in-process fabrications, non-destructive tests, and acceptance tests.

(c) Documentation, traceability, and accountability are maintained for each unique pressure vessel or system, including descriptions of design, pressure, testing, operation, repair, and maintenance.

H. Motor Vehicle Safety.

A. Motor Vehicle Safety Program protects the safety and health of all drivers and passengers in

Government-owned or -leased motor vehicles and powered industrial equipment. The Motor Vehicle Safety Program is tailored for the individual DOE site or facility, based on an analysis of the needs of that particular site or facility, and addresses the following areas:

1. Minimum licensing requirements (including appropriate testing and medical qualification) for personnel operating motor vehicles and powered industrial equipment.
2. Requirements for the use of seat belts and provision of other safety devices.
3. Training for specialty vehicle operators.
4. Requirements for motor vehicle maintenance and inspection.
5. Uniform traffic and pedestrian control devices and road signs.
6. On-site speed limits and other traffic rules.
7. Awareness campaigns and incentive programs to encourage safe driving.
8. Enforcement provisions.

I. Biological Safety.

1. Comply with appropriate regulatory measures for the safe possession, handling, transfer, use, or receipt of biological agents, including select agents or toxins, at DOE facilities. See 42 CFR part 73 Possession, Use and Transfer of Select Agents and Toxins, 9 CFR part 121 Possession, Use and Transfer of Biological Agents and Toxins, 7 CFR part 331 Possession, Use and Transfer of Biological Agents and Toxins, and 29 CFR 1910.1030, Occupational Exposures to Bloodborne Pathogens), and adhere to the guidance of the CDC publication, *Biosafety in Microbiological and Biomedical Laboratories* (BMBL), as noted in section I, paragraph M of this appendix.

2. Establish an Institutional Biosafety Committee (IBC) or equivalent, which will be responsible for reviewing any work with biological agents, including select agents and toxins, for compliance with

appropriate CDC, Department of Agriculture, NIH, requirements and WHO and other international, Federal, State and local guidelines and assessment of containment level, facilities, procedures, practices, and training and expertise of personnel. In addition, this committee should review for compliance the site security, safeguards, and emergency management plans and procedures as related to work with etiologic agents.

3. Maintain a readily retrievable inventory and status of biological agents, including select agents and toxins and confirm compliance with the requirements of this appendix in a written statement to the head of the DOE field element within 60 days of incorporation of this appendix into the contract. Provide to the responsible field and area office, through the laboratory IBC (or its equivalent), an annual status report describing the status and inventory of biological agents, including select agents and toxins and program.

4. Inform the head of the appropriate DOE field element of each Laboratory Registration/Select Agent Program registration application package requesting registration of a laboratory facility at Biosafety Level 2, 3, or 4, for the purpose of transferring, receiving, or handling select agents or toxins.

5. Inform the head of the appropriate DOE field element of each CDC Form EA-101, Transfer of Select Agents, upon initial submission of the Form EA-101 to a vendor or other supplier requesting or ordering a select agent for possession, transfer, receipt, and handling in the registered facility. Inform DOE of final disposition and/or destruction of the select agent, within 10 days of completion of the Form EA-101.

6. Confirm the site safeguards and security plans or security plan, and emergency management programs address biological agents, including select agents and toxins.

7. Establish an immunization policy for personnel working with biological agents based on the recommendations contained in the U.S. Public Health Service Advisory Committee on Immunization Practices (ACIP) and as updated in the CDC *Morbidity and Mortality Weekly Report*. The ACIP

provides basic guidance, but specific immunization actions should be based on the DOE facility evaluation of risk and benefit of immunization.

APPENDIX B TO PART 851--GENERAL STATEMENT OF ENFORCEMENT POLICY

I. Introduction

(a) This policy statement sets forth the general framework through which the U.S. Department of Energy (DOE) will seek to ensure compliance with its worker safety and health regulations, and, in particular, exercise the civil penalty authority provided to DOE in section 3173 of Public Law 107-314, Bob Stump National Defense Authorization Act for Fiscal Year 2003 (December 2, 2002) (“NDAA”), amending the Atomic Energy Act (“AEA”) to add section 234C. The policy set forth herein is applicable to violations of safety and health regulations in this part by DOE contractors, including DOE contractors who are indemnified under the Price Anderson Act, 42 U.S.C. 2210(d), and their subcontractors and suppliers (hereafter collectively referred to as DOE contractors). This policy statement is not a regulation and is intended only to provide general guidance to those persons subject to the regulations in this part. It is not intended to establish a "cookbook" approach to the initiation and resolution of situations involving noncompliance with the regulations in this part. Rather, DOE intends to consider the particular facts of each noncompliance situation in determining whether enforcement sanctions are appropriate and, if so, the appropriate magnitude of those sanctions. DOE may well deviate from this policy statement when appropriate in the circumstances of particular cases. This policy statement is not applicable to activities and facilities covered under E.O. 12344, 42 U.S.C. 7158 note, pertaining to Naval Nuclear Propulsion, and other activities excluded from the scope of the rule.

(b) The DOE goal in the compliance arena is to enhance and protect the safety and health of workers at DOE facilities by fostering a culture among both the DOE line organizations and the contractors

that actively seeks to attain and sustain compliance with the regulations in this part. The enforcement program and policy have been developed with the express purpose of achieving safety inquisitiveness and voluntary compliance. DOE will establish effective administrative processes and positive incentives to the contractors for the open and prompt identification and reporting of noncompliances, performance of effective root cause analysis, and initiation of comprehensive corrective actions to resolve both noncompliance conditions and program or process deficiencies that led to noncompliance.

(c) In the development of the DOE enforcement policy, DOE recognizes that the reasonable exercise of its enforcement authority can help to reduce the likelihood of serious incidents. This can be accomplished by providing greater emphasis on a culture of safety in existing DOE operations, and strong incentives for contractors to identify and correct noncompliance conditions and processes in order to protect human health and the environment. DOE wants to facilitate, encourage, and support contractor initiatives for the prompt identification and correction of problems. DOE will give due consideration to such initiatives and activities in exercising its enforcement discretion.

(d) DOE may modify or remit civil penalties in a manner consistent with the mitigation and adjustment factors set forth in this policy with or without conditions. DOE will carefully consider the facts of each case of noncompliance and will exercise appropriate discretion in taking any enforcement action. Part of the function of a sound enforcement program is to assure a proper and continuing level of safety vigilance. The reasonable exercise of enforcement authority will be facilitated by the appropriate application of safety requirements to DOE facilities and by promoting and coordinating the proper contractor and DOE safety compliance attitude toward those requirements.

II. Purpose

The purpose of the DOE enforcement program is to promote and protect the safety and health of

workers at DOE facilities by:

- (a) Ensuring compliance by DOE contractors with the regulations in this part.
- (b) Providing positive incentives for DOE contractors:
 - (1) Timely self-identification by contractors of worker safety deficiencies,
 - (2) Prompt and complete reporting of such deficiencies to DOE,
 - (3) Prompt correction of safety deficiencies in a manner that precludes recurrence, and,
 - (4) Identification of modifications in practices or facilities that can improve worker safety and health.
- (c) Deterring future violations of DOE requirements by a DOE contractor.
- (d) Encouraging the continuous overall improvement of operations at DOE facilities.

III. Statutory Authority

The Department of Energy Organization Act, 42 U.S.C. 7101-7385o, the Energy Reorganization Act of 1974 (ERA), 42 U.S.C. 5801-5911 and the Atomic Energy Act of 1954, as amended, (AEA) 42 U.S.C. 2011, require DOE to protect the public safety and health, as well as the safety of workers at DOE facilities, in conducting its activities, and grant DOE broad authority to achieve this goal. Section 234C of the AEA makes DOE contractors covered by the DOE Price-Anderson indemnification system, and their subcontractors and suppliers, subject to civil penalties for violations of the worker safety and health requirements promulgated in this part. 42 U.S.C. 2282c.

IV. Responsibilities

(a) The Director, as the principal enforcement officer of the DOE, has been delegated the authority to conduct enforcement investigations and conferences, issue Notices of Violations and proposed civil penalties, Enforcement Letters, Consent Orders, subpoenas, orders to compel attendance and disclosure of information or documents obtained during an investigation or inspection. The Secretary issues Compliance

Orders.

(b) The NNSA Administrator, rather than the Director, signs, issues and serves the following actions that direct NNSA contractors: Subpoenas; Orders to compel attendance; Disclosure of information or documents obtained during an investigation or inspection; Preliminary Notices of Violations; and Final Notices of Violations. The NNSA Administrator acts after consideration of the Director's recommendation.

V. Procedural Framework

(a) Title 10 CFR part 851 sets forth the procedures DOE will use in exercising its enforcement authority, including the issuance of Notices of Violation and the resolution of an administrative appeal in the event a DOE contractor elects to petition the Office of Hearings and Appeals for review.

(b) Pursuant to 10 CFR part 851 subpart C, the Director initiates the enforcement process by initiating and conducting investigations and inspections and issuing a Preliminary Notice of Violation (PNOV) with or without a proposed civil penalty. The DOE contractor is required to respond in writing to the PNOV within 30 days, either admitting the violation and waiving its right to contest the proposed civil penalty and paying it, admitting the violation but asserting the existence of mitigating circumstances that warrant either the total or partial remission of the civil penalty, or denying that the violation has occurred and providing the basis for its belief that the PNOV is incorrect. After evaluation of the DOE contractor's response, the Director may determine that no violation has occurred, that the violation occurred as alleged in the PNOV but that the proposed civil penalty should be remitted in whole or in part, or that the violation occurred as alleged in the PNOV and that the proposed civil penalty is appropriate, notwithstanding the asserted mitigating circumstances. In the latter two instances, the Director will issue a Final Notice of Violation (FNOV) or an FNOV and proposed civil penalty.

(c) An opportunity to challenge an FNOV is provided in administrative appeal provisions. 10 CFR

851.205. Any contractor that receives an FNOV may petition the Office of Hearings and Appeals for review of the final notice in accordance with 10 CFR part 1003, Subpart G, within 30 calendar days from receipt of the final notice. An administrative appeal proceeding is not initiated until the DOE contractor against which an FNOV has been issued requests an administrative hearing rather than waiving its right to contest the FNOV and proposed civil penalty, if any, and paying the civil penalty. However, it should be emphasized that DOE encourages the voluntary resolution of a noncompliance situation at any time, either informally prior to the initiation of the enforcement process or by consent order before or after any formal proceeding has begun.

VI. Severity of Violations

(a) Violations of the worker safety and health requirements in this part have varying degrees of safety and health significance. Therefore, the relative importance of each violation must be identified as the first step in the enforcement process. Violations of the worker safety and health requirements are categorized in three levels of severity to identify their relative seriousness. Notices of Violation are issued for noncompliance which, when appropriate, propose civil penalties commensurate with the severity level of the violations involved.

(b) To assess the potential safety and health impact of a particular violation, DOE will categorize violations of worker safety and health requirements as follows:

(1) A Severity Level I violation is a serious violation. A serious violation shall be deemed to exist in a place of employment if there is a potential that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment. A Severity Level I violation would be subject to a base civil penalty of up to 100% of the maximum base civil penalty of \$70,000.

(2) A Severity Level II violation is an other-than-serious violation. An other-than-serious violation occurs where the most serious injury or illness that would potentially result from a hazardous condition cannot reasonably be predicted to cause death or serious physical harm to employees but does have a direct relationship to their safety and health. A Severity Level II violation would be subject to a base civil penalty up to 50% of the maximum base civil penalty (\$35,000).

(3) A Severity Level III violations is a *de minimis* violation. As a general matter, these minor violations will be identified as noncompliances and tracked to assure that appropriate remedial/corrective action is taken to prevent their recurrence, and evaluated to determine if generic or specific problems exist. If circumstances demonstrate that a number of related minor noncompliances have occurred in a reasonable time frame (*e.g.* all identified during the same assessment), or that related minor noncompliances have recurred despite the DOE contractor's having had sufficient opportunity to correct the problem, DOE may choose in its discretion to consider the noncompliances in the aggregate as a more serious violation warranting a Severity Level III designation, a Notice of Violation and a possible civil penalty. A Severity Level III violation would be subject to a base civil penalty up to 10% of the maximum base civil penalty (\$7,000).

(c) Isolated minor violations of worker safety and health regulations will not be the subject of formal enforcement action through the issuance of a Notice of Violation.

(d) The severity level of a violation will be dependent, in part, on the degree of culpability of the DOE contractor with regard to the violation. Thus, inadvertent or negligent violations will be viewed differently from those in which there is gross negligence, deception or willfulness. In addition to the significance of the underlying violation and level of culpability involved, DOE will also consider the position, training and experience of the person involved in the violation. Thus, for example, a violation may be deemed to be more significant if a senior manager of an organization is involved rather than a foreman or

non-supervisory employee. In this regard, while management involvement, direct or indirect, in a violation may lead to an increase in the severity level of a violation and proposed civil penalty, the lack of such involvement will not constitute grounds to reduce the severity level of a violation or mitigate a civil penalty. Allowance of mitigation in such circumstances could encourage lack of management involvement in DOE contractor activities and a decrease in protection of worker safety and health.

(e) Other factors which will be considered by DOE in determining the appropriate severity level of a violation are the duration of the violation, the past performance of the DOE contractor in the particular activity area involved, whether the DOE contractor had prior notice of a potential problem, and whether there are multiple examples of the violation in the same time frame rather than an isolated occurrence. The relative weight given to each of these factors in arriving at the appropriate severity level will be dependent on the circumstances of each case.

(f) DOE expects contractors to provide full, complete, timely, and accurate information and reports. Accordingly, the severity level of a violation involving either failure to make a required report or notification to the DOE or an untimely report or notification will be based upon the significance of, and the circumstances surrounding, the matter that should have been reported. A contractor will not normally be cited for a failure to report a condition or event unless the contractor was actually aware or should have been aware of the condition or event which it failed to report.

VII. Enforcement Conferences

(a) Should DOE determine, after completion of all assessment and investigation activities associated with a potential or alleged violation of the worker safety and health requirements, that there is a reasonable basis to believe that a violation has actually occurred, and the violation may warrant a civil penalty or issuance of an enforcement action, DOE will normally hold an enforcement conference with the DOE contractor

involved prior to taking enforcement action. DOE may also elect to hold an enforcement conference for potential violations which would not ordinarily warrant a civil penalty or enforcement action but which could, if repeated, lead to such action. The purpose of the enforcement conference is to assure the accuracy of the facts upon which the preliminary determination to consider enforcement action is based, discuss the potential or alleged violations, their significance and causes, and the nature of and schedule for the DOE contractor's corrective actions, determine whether there are any aggravating or mitigating circumstances, and obtain other information which will help determine the appropriate enforcement action.

(b) DOE contractors will be informed prior to a meeting when that meeting is considered to be an enforcement conference. Such conferences are informal mechanisms for candid pre-decisional discussions regarding potential or alleged violations and will not normally be open to the public. In circumstances for which immediate enforcement action is necessary in the interest of worker safety and health, such action will be taken prior to the enforcement conference, which may still be held after the necessary DOE action has been taken.

VIII. Enforcement Letter

(a) In cases where DOE has decided not to conduct an investigation or inspection or issue a Preliminary Notice of Violation (PNOV), DOE may send an Enforcement Letter to the contractor signed by the Director. The Enforcement Letter is intended to communicate the basis of the decision not to pursue enforcement action for a noncompliance. The Enforcement Letter is intended to direct contractors to the desired level of worker safety and health performance. It may be used when DOE concludes the specific noncompliance at issue is not of the level of significance warranted to conduct an investigation or inspection or for issuance of a PNOV. Even where a noncompliance may be significant, the Enforcement Letter recognizes that the contractor's actions may have attenuated the need for enforcement action. The Enforcement Letter

will typically recognize how the contractor handled the circumstances surrounding the noncompliance and address additional areas requiring the contractor's attention and DOE's expectations for corrective action.

The Enforcement Letter notifies the contractor that when verification is received that corrective actions have been implemented, DOE will close the matter.

(b) In general, Enforcement Letters communicate DOE's expectations with respect to any aspect of the requirements of this part, including identification and reporting of issues, corrective actions, and implementation of the contractor's safety and health program. DOE might, for example, wish to recognize some action of the contractor that is of particular benefit to worker safety and health that is a candidate for emulation by other contractors. On the other hand, DOE may wish to bring a program shortcoming to the attention of the contractor that, but for the lack of worker safety and health significance of the immediate issue, might have resulted in the issuance of a PNOV. An Enforcement Letter is not an enforcement action. An Enforcement Letter cannot provide the basis for a legally enforceable requirement pursuant to this Part. Accordingly, a reference to a guidance document in an Enforcement Letter does not make the provisions of the guidance document mandatory or otherwise legally enforceable. There must be an independent basis for making provisions of a guidance document mandatory such as explicit incorporation in the worker safety and health program.

(c) With respect to many noncompliances, an Enforcement Letter may not be required. When DOE decides that a contractor has appropriately corrected a noncompliance or that the significance of the noncompliance is sufficiently low, it may close out an investigation simply through an annotation in the DOE Noncompliance Tracking System (NTS). A closeout of a noncompliance with or without an Enforcement Letter may only take place after DOE has confirmed that corrective actions have been completed.

IX. Enforcement Actions

(a) This section describes the enforcement sanctions available to DOE and specifies the conditions under which each may be used. The basic sanctions are Notices of Violation and civil penalties.

(b) The nature and extent of the enforcement action is intended to reflect the seriousness of the violation involved. For the vast majority of violations for which DOE assigns severity levels as described previously, a Notice of Violation will be issued, requiring a formal response from the recipient describing the nature of and schedule for corrective actions it intends to take regarding the violation.

1. Notice of Violation

(a) A Notice of Violation (either a Preliminary or Final Notice) is a document setting forth the conclusion of DOE that one or more violations of the worker safety and health requirements has occurred. Such a notice normally requires the recipient to provide a written response which may take one of several positions described in section V of this policy statement. In the event that the recipient concedes the occurrence of the violation, it is required to describe corrective steps which have been taken and the results achieved; remedial actions which will be taken to prevent recurrence; and the date by which full compliance will be achieved.

(b) DOE will use the Notice of Violation as the standard method for formalizing the existence of a violation and, in appropriate cases as described in this section, the Notice of Violation will be issued in conjunction with the proposed imposition of a civil penalty. In certain limited instances, as described in this section, DOE may refrain from the issuance of an otherwise appropriate Notice of Violation. However, a Notice of Violation will virtually always be issued for willful violations, if past corrective actions for similar violations have not been sufficient to prevent recurrence and there are no other mitigating circumstances, or if the circumstances otherwise warrant increasing lower severity level violations to a higher severity level.

(c) DOE contractors are not ordinarily cited for violations resulting from matters not within their

control, such as equipment failures that were not avoidable by reasonable quality assurance measures, proper maintenance, or management controls. With regard to the issue of funding, however, DOE does not consider an asserted lack of funding to be a justification for noncompliance with the worker safety and health requirements.

(d) DOE expects the contractors which operate its facilities to have the proper management and supervisory systems in place to assure that all activities at DOE facilities, regardless of who performs them, are carried out in compliance with all the worker safety and health requirements. Therefore, contractors are normally held responsible for the acts of their employees and subcontractor employees in the conduct of activities at DOE facilities. Accordingly, this policy should not be construed to excuse personnel errors.

(e) The limitations on remedies under Sec. 234C will be implemented as follows:

(1) DOE may assess civil penalties of not more than \$70,000 per violation per day on contractors (and their subcontractors and suppliers) that are indemnified by the Price-Anderson Act, 42 U.S.C. 2210(d). 10 CFR 851.4(c). DOE will not assess civil penalties on contractors (and their subcontractors and suppliers) that are not indemnified under the Price-Anderson Act.

(2) DOE may seek contract fee reductions through the contract's *Conditional Payment of Fee* Clause in the Department of Energy Acquisition Regulation (DEAR). See 10 CFR 851.4(b); 48 CFR parts 923, 952, 970. Policies for contract fee reductions are not established by this policy statement. The contracting officer must coordinate with the Director, the DOE Official to whom the Secretary has assigned the authority to investigate the nature and extent of compliance with the requirements of this part, before pursuing contract fee reduction in the event of a violation relating to the enforcement of worker safety and health concerns. Likewise, the Director must coordinate with the contracting officer when conducting investigations and pursuing an enforcement action.

(3) For the same violation of a worker safety and health requirement in this part, DOE may pursue either civil penalties (for indemnified contractors and their subcontractors and suppliers) or a contract fee reduction, but not both. 10 CFR 851.4(d).

(4) An upper ceiling applies to civil penalties assessed on certain contractors specifically listed in 170d. of the Atomic Energy Act, 42 U.S.C. 2282a(d), for activities conducted at specified facilities. For these contractors, the total amount of civil penalties and contract penalties in a fiscal year may not exceed the total amount of fees paid by DOE to that entity in that fiscal year. 10 CFR 851.4(e).

(5) DOE will not issue civil penalties under both this part and under the nuclear safety procedural regulations in 10 CFR part 820 for the same violation. 10 CFR 851.4(f).

(f) Regarding the relationship of civil penalties and contract fee reductions where DOE may elect between remedies, DOE generally intends to use civil penalties as the remedy for most violations. Where DOE may elect between remedies, the Director may refer a violation to the appropriate DOE official responsible for administering the *Conditional Payment of Fee* clause to consider invoking the provisions for reducing contract fees if the violation is especially egregious or indicates a general failure to perform under the contract with respect to worker safety and health. In determining whether to refer a violation, the Director generally would focus on factors such as willfulness, repeated violations, death, serious injury, patterns of systemic violations, flagrant DOE-identified violations, repeated poor performance in an area of concern, or serious breakdown in management controls. Such factors involved in a violation would call into question a contractor's commitment and ability to achieve the fundamental obligation of providing safe and healthy workplaces for workers.

2. Civil Penalty

(a) A civil penalty is a monetary penalty that may be imposed for violations of requirements of this

part. *See* 10 CFR 851.4(b). Civil penalties are designed to emphasize the need for lasting remedial action, deter future violations, and underscore the importance of DOE contractor self-identification, reporting and correction of violations of the worker safety and health requirements in this part.

(b) Absent mitigating circumstances as described below, or circumstances otherwise warranting the exercise of enforcement discretion by DOE as described in this section, civil penalties will be proposed for Severity Level I and II violations.

(c) DOE will impose different base level penalties considering the severity level of the violation by Price-Anderson indemnified contractors. Table 1 shows the daily base civil penalties for the various categories of severity levels. However, as described above in section IV, the imposition of civil penalties will also take into account the gravity, circumstances, and extent of the violation or violations and, with respect to the violator, any history of prior similar violations and the degree of culpability and knowledge.

(d) Regarding the factor of ability of DOE contractors to pay the civil penalties, it is not DOE's intention that the economic impact of a civil penalty be such that it puts a DOE contractor out of business. Contract termination, rather than civil penalties, is used when the intent is to terminate these activities. The deterrent effect of civil penalties is best served when the amount of such penalties takes this factor into account. However, DOE will evaluate the relationship of affiliated entities to the contractor (such as parent corporations) when the contractor asserts that it cannot pay the proposed penalty.

(e) DOE will review each case involving a proposed civil penalty on its own merits and adjust the base civil penalty values upward or downward appropriately. As indicated above, Table 1 identifies the daily base civil penalty values for different severity levels. After considering all relevant circumstances, civil penalties may be raised or lowered based upon the adjustment factors described below in this section. In no instance will a civil penalty for any one violation exceed the statutory limit of \$70,000. However, it should be

emphasized that if the DOE contractor is or should have been aware of a violation and has not reported it to DOE and taken corrective action despite an opportunity to do so, each day the condition existed may be considered a separate violation and, as such, subject to a separate civil penalty. Further, as described in this section, the duration of a violation will be taken into account in determining the appropriate severity level of the base civil penalty.

Table 1--Severity Level Base Civil Penalties

Severity level	Base civil penalty amount
	(percentage of maximum per violation per day)

I	100
II	50
III	10

3. Adjustment Factors

(a) DOE's enforcement program is not an end in itself, but a means to achieve compliance with the worker safety and health requirements in this part, and civil penalties are to emphasize the importance of compliance and to deter future violations. The single most important goal of the DOE enforcement program is to encourage early identification and reporting of worker protection deficiencies and violations of the worker safety and health requirements in this part by the DOE contractors themselves rather than by DOE, and the prompt correction of any deficiencies and violations so identified. DOE believes that DOE contractors are in the best position to identify and promptly correct noncompliance with the worker safety

and health requirements in this part. DOE expects that these contractors should have in place internal compliance programs which will ensure the detection, reporting and prompt correction of worker protection related problems that may constitute, or lead to, violations of the worker safety and health requirements in this part, before, rather than after, DOE has identified such violations. Thus, DOE contractors will almost always be aware of worker safety and health problems before they are discovered by DOE. Obviously, worker safety and health is enhanced if deficiencies are discovered (and promptly corrected) by the DOE contractor, rather than by DOE, which may not otherwise become aware of a deficiency until later on, during the course of an inspection, performance assessment, or following an incident at the facility. Early identification of worker safety and health-related problems by DOE contractors has the added benefit of allowing information which could prevent such problems at other facilities in the DOE complex to be shared with all appropriate DOE contractors.

(b) Pursuant to this enforcement philosophy, DOE will provide substantial incentive for the early self-identification, reporting and prompt correction of problems which constitute, or could lead to, violations of the worker safety and health requirements. Thus, application of the adjustment factors set forth below may result in a reduced or no civil penalty being assessed for violations that are identified, reported, and promptly and effectively corrected by the DOE contractor.

(c) On the other hand, ineffective programs for problem identification and correction are unacceptable. Thus, for example, where a contractor fails to disclose and promptly correct violations of which it was aware or should have been aware, substantial civil penalties are warranted and may be sought, including the assessment of civil penalties for continuing violations on a per day basis.

(d) Further, in cases involving factors of willfulness, repeated violations, death, serious injury, patterns of systemic violations, flagrant DOE-identified violations, repeated poor performance in an area of

concern, or serious breakdown in management controls, DOE intends to apply its full statutory enforcement authority where such action is warranted.

4. Identification and Reporting

Reduction of the base civil penalty shown in Table 1 may be given when a DOE contractor identifies the violation and promptly reports the violation to the DOE. In weighing this factor, consideration will be given to, among other things, the opportunity available to discover the violation, the ease of discovery and the promptness and completeness of any required report. No consideration will be given to a reduction in penalty if the DOE contractor does not take prompt action to report the problem to DOE upon discovery, or if the immediate actions necessary to restore compliance with the worker safety and health requirements are not taken.

5. Self-Identification and Tracking Systems

(a) DOE strongly encourages contractors to self-identify noncompliances with the worker safety and health requirements before the noncompliances lead to a string of similar and potentially more significant events or consequences. When a contractor identifies a noncompliance through its own self-monitoring activity, DOE will normally allow a reduction in the amount of civil penalties, unless prior opportunities existed for contractors to identify the noncompliance. DOE will normally not allow a reduction in civil penalties for self-identification if significant DOE intervention was required to induce the contractor to report a noncompliance.

(b) Self-identification of a noncompliance is possibly the single most important factor in considering a reduction in the civil penalty amount. Consideration of self-identification is linked to, among other things, whether prior opportunities existed to discover the violation, and if so, the age and number of such opportunities; the extent to which proper contractor controls should have identified or prevented the violation;

whether discovery of the violation resulted from a contractor's self-monitoring activity; the extent of DOE involvement in discovering the violation or in prompting the contractor to identify the violation; and the promptness and completeness of any required report. Self-identification is also considered by DOE in deciding whether to pursue an investigation.

(c) DOE will use the voluntary Noncompliance Tracking System (NTS) which allows contractors to elect to report noncompliances. In the guidance document supporting the NTS, DOE will establish reporting thresholds for reporting items of noncompliance of potentially greater worker safety and health significance into the NTS. Contractors may, however, use their own self-tracking systems to track noncompliances below the reporting threshold. This self-tracking is considered to be acceptable self-reporting as long as DOE has access to the contractor's system and the contractor's system notes the item as a noncompliance with a DOE safety and health requirement. For noncompliances that are below the reportability thresholds, DOE will credit contractor self-tracking as representing self-reporting. If an item is not reported in NTS but only tracked in the contractor's system and DOE subsequently finds the facts and their worker safety and health significance have been significantly mischaracterized, DOE will not credit the internal tracking as representing appropriate self-reporting.

6. Self-Disclosing Events

(a) DOE expects contractors to demonstrate acceptance of responsibility for worker safety and health by proactively identifying noncompliance conditions in their programs and processes. In deciding whether to reduce any civil penalty proposed for violations revealed by the occurrence of a self-disclosing event, DOE will consider the ease with which a contractor could have discovered the noncompliance and the prior opportunities that existed to discover the noncompliance. When the occurrence of an event discloses noncompliances that the contractor could have or should have identified before the event, DOE will not

generally allow a reduction in civil penalties for self-identification, even if the underlying noncompliances were reported to DOE. If a contractor simply reacts to events that disclose potentially significant consequences or downplays noncompliances which did not result in significant consequences to worker safety and health, such contractor actions do not lead to the improvement in worker safety and health contemplated by Part 851.

(b) The key test is whether the contractor reasonably could have detected any of the underlying noncompliances that contributed to the event. Examples of events that provide opportunities to identify noncompliances include, but are not limited to:

(1) Prior notifications of potential problems such as those from DOE operational experience publications or vendor equipment deficiency reports;

(2) Normal surveillance, quality assurance assessments, and post-maintenance testing;

(3) Readily observable parameter trends; and

(4) Contractor employee or DOE observations of potential worker safety and health problems.

(c) Failure to utilize these types of events and activities to address noncompliances may result in higher civil penalty assessments or a DOE decision not to reduce civil penalty amounts.

(d) Alternatively, if, following a self-disclosing event, DOE finds that the contractor's processes and procedures were adequate and the contractor's personnel generally behaved in a manner consistent with the contractor's processes and procedures, DOE could conclude that the contractor could not have been reasonably expected to find the single procedural noncompliance that led to the event and thus, might allow a reduction in civil penalties.

7. Corrective Action To Prevent Recurrence

The promptness (or lack thereof) and extent to which the DOE contractor takes corrective action, including actions to identify root cause and prevent recurrence, may result in an increase or decrease in the

base civil penalty shown in Table 1. For example, very extensive corrective action may result in DOE's reducing the proposed civil penalty from the base value shown in Table 1. On the other hand, the civil penalty may be increased if initiation of corrective action is not prompt or if the corrective action is only minimally acceptable. In weighing this factor, consideration will be given to, among other things, the appropriateness, timeliness and degree of initiative associated with the corrective action. The comprehensiveness of the corrective action will also be considered, taking into account factors such as whether the action is focused narrowly to the specific violation or broadly to the general area of concern.

8. DOE's Contribution to a Violation

There may be circumstances in which a violation of a DOE worker safety and health requirement results, in part or entirely, from a direction given by DOE personnel to a DOE contractor to either take or forbear from taking an action at a DOE facility. In such cases, DOE may refrain from issuing an NOV, or may mitigate, either partially or entirely, any proposed civil penalty, provided that the direction upon which the DOE contractor relied is documented in writing, contemporaneously with the direction. It should be emphasized, however, that pursuant to 10 CFR 851.7, no interpretation of a requirement of this part is binding upon DOE unless issued in writing by the Office of the General Counsel. Further, as discussed above in this policy statement, lack of funding by itself will not be considered as a mitigating factor in enforcement actions.

9. Exercise of Discretion

Because DOE wants to encourage and support DOE contractor initiative for prompt self-identification, reporting and correction of problems, DOE may exercise discretion as follows:

(a) In accordance with the previous discussion, DOE may refrain from issuing a civil penalty for a violation which meets all of the following criteria:

(1) The violation is promptly identified and reported to DOE before DOE learns of it or the violation is identified by a DOE independent assessment, inspection or other formal program effort.

(2) The violation is not willful or a violation that could reasonably be expected to have been prevented by the DOE contractor's corrective action for a previous violation.

(3) The DOE contractor, upon discovery of the violation, has taken or begun to take prompt and appropriate action to correct the violation.

(4) The DOE contractor has taken, or has agreed to take, remedial action satisfactory to DOE to preclude recurrence of the violation and the underlying conditions which caused it.

(b) DOE will not issue a Notice of Violation for cases in which the violation discovered by the DOE contractor cannot reasonably be linked to the conduct of that contractor in the design, construction or operation of the DOE facility involved, provided that prompt and appropriate action is taken by the DOE contractor upon identification of the past violation to report to DOE and remedy the problem.

(c) In situations where corrective actions have been completed before termination of an inspection or assessment, a formal response from the contractor is not required and the inspection or integrated performance assessment report serves to document the violation and the corrective action. However, in all instances, the contractor is required to report the noncompliance through established reporting mechanisms so the noncompliance issue and any corrective actions can be properly tracked and monitored.

(d) If DOE initiates an enforcement action for a violation, and as part of the corrective action for that violation, the DOE contractor identifies other examples of the violation with the same root cause, DOE may refrain from initiating an additional enforcement action. In determining whether to exercise this discretion, DOE will consider whether the DOE contractor acted reasonably and in a timely manner appropriate to the safety significance of the initial violation, the comprehensiveness of the corrective action, whether the matter

was reported, and whether the additional violation(s) substantially change the safety significance or character of the concern arising out of the initial violation.

(e) It should be emphasized that the preceding paragraphs are solely intended to be examples indicating when enforcement discretion may be exercised to forego the issuance of a civil penalty or, in some cases, the initiation of any enforcement action at all. However, notwithstanding these examples, a civil penalty may be proposed or Notice of Violation issued when, in DOE's judgment, such action is warranted on the basis of the circumstances of an individual case.

X. Inaccurate and Incomplete Information

(a) A violation of the worker safety and health requirements to provide complete and accurate information to DOE, 10 CFR 851.5, can result in the full range of enforcement sanctions, depending upon the circumstances of the particular case and consideration of the factors discussed in this section. Violations involving inaccurate or incomplete information or the failure to provide significant information identified by a DOE contractor normally will be categorized based on the guidance in section VI, "Severity of Violations."

(b) DOE recognizes that oral information may in some situations be inherently less reliable than written submittals because of the absence of an opportunity for reflection and management review. However, DOE must be able to rely on oral communications from officials of DOE contractors concerning significant information. In determining whether to take enforcement action for an oral statement, consideration will be given to such factors as:

(1) The degree of knowledge that the communicator should have had regarding the matter in view of his or her position, training, and experience;

(2) The opportunity and time available prior to the communication to assure the accuracy or completeness of the information;

- (3) The degree of intent or negligence, if any, involved;
- (4) The formality of the communication;
- (5) The reasonableness of DOE reliance on the information;
- (6) The importance of the information that was wrong or not provided; and
- (7) The reasonableness of the explanation for not providing complete and accurate information.

(c) Absent gross negligence or willfulness, an incomplete or inaccurate oral statement normally will not be subject to enforcement action unless it involves significant information provided by an official of a DOE contractor. However, enforcement action may be taken for an unintentionally incomplete or inaccurate oral statement provided to DOE by an official of a DOE contractor or others on behalf of the DOE contractor, if a record was made of the oral information and provided to the DOE contractor thereby permitting an opportunity to correct the oral information, such as if a transcript of the communication or meeting summary containing the error was made available to the DOE contractor and was not subsequently corrected in a timely manner.

(d) When a DOE contractor has corrected inaccurate or incomplete information, the decision to issue a citation for the initial inaccurate or incomplete information normally will be dependent on the circumstances, including the ease of detection of the error, the timeliness of the correction, whether DOE or the DOE contractor identified the problem with the communication, and whether DOE relied on the information prior to the correction. Generally, if the matter was promptly identified and corrected by the DOE contractor prior to reliance by DOE, or before DOE raised a question about the information, no enforcement action will be taken for the initial inaccurate or incomplete information. On the other hand, if the misinformation is identified after DOE relies on it, or after some question is raised regarding the accuracy of the information, then some enforcement action normally will be taken even if it is in fact corrected.

(e) If the initial submission was accurate when made but later turns out to be erroneous because of newly discovered information or advances in technology, a citation normally would not be appropriate if, when the new information became available, the initial submission was promptly corrected.

(f) The failure to correct inaccurate or incomplete information that the DOE contractor does not identify as significant normally will not constitute a separate violation. However, the circumstances surrounding the failure to correct may be considered relevant to the determination of enforcement action for the initial inaccurate or incomplete statement. For example, an unintentionally inaccurate or incomplete submission may be treated as a more severe matter if a DOE contractor later determines that the initial submission was in error and does not promptly correct it or if there were clear opportunities to identify the error.

XI. Secretarial Notification and Consultation

The Secretary will be provided written notification of all enforcement actions involving proposed civil penalties. The Secretary will be consulted prior to taking action in the following situations:

- (a) Any action the Director, or the NNSA Administrator concerning actions involving NNSA contractors, believes warrants the Secretary's involvement; or
- (b) Any proposed enforcement action for which the Secretary asks to be consulted.